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APPENDIX.

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-41

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO,

Petitioner,

vs.

FLAIR BUILDERS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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APPENDIX.

RELEVANT DOCKET ENTRIES.

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Date	Proceedings
11- 7-68	Filed complaint.
12- 3-68	Filed Motion of defendant to strike and dismiss with affidavit of Robert V. Richards.
1-30-69	Filed Affidavit of Ambrose J. Meagher in support of complaint.
3-14-69	Filed Affidavit of Robert V. Richards.
4-14-69	Memorandum opinion filed. Order complaint hereby dismissed for failure to state a cause of action—Decker, *J.*
5-29-69	Filed Motion for leave to file first amended complaint.
6- 3-69	Leave given plaintiff to file first amended complaint—Decker, *J.*
6- 3-69	Filed First Amended Complaint.
6-30-69	Filed Motion to dismiss First Amended Complaint.
8-26-69	Memorandum Opinion filed. Ordered that (1) defendant's motion to dismiss is DENIED; and (2) an evidentiary hearing is scheduled for Friday, September 12, 1969 at 2:00 P. M. to consider which issues, if any, employer agreed to arbitrate.—DRAFT—Decker, *J.*
9-29-69	Filed Defendant's answer to first amended complaint.

10–24–69	Evidentiary hearing held on existence of collective bargaining agreement and cause taken under advisement.—Decker, *J.*
10–29–69	Filed letter of Judge Decker to attorneys of record.
10–29–69	Order plaintiff within 10 days to advise Court in some detail what violations of purported agreement it seeks to arbitrate and time of their occurrence.—Decker, *J.*
11–10–69	Filed letter dated 11-6-69 from Shulman and Baum to Judge Decker re arbitration of total violation of the entire agreement * * *
11–18–69	Filed Memorandum in answer to communication of plaintiff's counsel.
12– 5–69	Filed Memorandum opinion.
12– 5–69	Memorandum opinion filed. Order complaint hereby dismissed.—Decker, *J.*
12–31–69	Filed plaintiff's notice of appeal.
2– 5–71	Opinion of Court of Appeals filed affirming judgment of the District Court, Stevens, *J.*, dissenting.
3– 5–71	Filed Plaintiff-Appellant's petition for rehearing.
4–12–71	Order filed denying petition for rehearing.

BEFORE THE

UNITED STATES DISTRICT COURT,

For the Northern District of Illinois.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO, *Plaintiff*, *vs.* FLAIR BUILDERS, *Defendant*.	No. 68 C 2091.

COMPLAINT.

Plaintiff, International Union of Operating Engineers, Local 150, AFL-CIO (hereinafter referred to as the "Plaintiff Union"), by its Attorneys, Bernard M. Baum and Daniel S. Shulman, complaining of Defendant, Flair Builders (hereinafter referred to as the "Defendant Company"), alleges as follows:

1. This Court has jurisdiction of this case by reason of the Labor Management Relations Act, 1947, Title III, Section 301, 61 Stat. 156, 29 USC 185 (a), as amended.

2. The Plaintiff Union is, and at all times hereinafter mentioned, was a voluntary association and labor organization, engaged in representing employees for the purposes of collective bargaining in the State of Illinois, and specifically in Will, Kendall, Grundy, Kane and Kankakee Counties, Illinois.

3. The Defendant Company is an employer in the construction industry in the State of Illinois.

4. Effective June 1, 1966, the Plaintiff Union entered into a Collective Bargaining Agreement (hereinafter referred to as the "Agreement") with the Will County Contractors, Chicago Outer Belt Contractors Association and the Fox Valley General Contractors Association and the individual members thereof, which Agreement covers Will, Kendall, Grundy, Kane and Kankakee Counties, Illinois. A copy of said Agreement is attached hereto as Plaintiff Union's exhibit A and made a part hereof.

5. Effective May 12, 1964, the Defendant Company became a party to said Agreement (Exhibit A) by signing a Memorandum of Agreement (hereinafter referred to as the "Memorandum") with the Plaintiff Union. A copy of said Memorandum is attached hereto as Plaintiff Union's exhibit B and made a part hereof.

6. Said Memorandum specifically adopts and incorporates the aforementioned agreement, pursuant to paragraph 3 of the Memorandum.

7. Since June 1, 1966, the Defendant Company has continually violated the Agreement by conduct including but not limited to: The refusal to hire employees through the Referral Offices of the Local Union for the performance of work covered by the Agreement; the refusal to pay the wage scale set forth in the Agreement; the refusal to contribute to and maintain employee fringe benefits, and a general refusal to abide by and adhere to any of the terms of the Agreement.

8. The Plaintiff Union, through its officers and agents, has demanded on numerous occasions that the Defendant Company adhere to the provisions of the Agreement in its operations as a contractor; however, the Defendant Company has refused to comply with such demands.

9. As a result of the Defendant Company's refusal to abide by the terms of the Agreement as aforementioned, the Plaintiff Union in its role as collective bargaining agent, has suffered and will continue to suffer damages including but not limited to the loss of work, the loss of wages, the denial of fringe benefits and the loss of all other benefits, terms and conditions of employment set forth in the Agreement, which has resulted from the said continual violations of the Agreement, by reason whereof the Plaintiff Union has been damaged in the sum of One Hundred Thousand Dollars ($100,000.00).

10. The Plaintiff Union has complied with any and all of the provisions of the said Agreement and is willing to so perform in accordance with said provisions of the Agreement.

11. The character of the unlawful acts done is reasonably expected to be continually done by the Defendant Company on any construction site within the aforementioned counties covered by the Agreement, and is such that the Plaintiff Union can be protected from said foreseeable irreparable harm only by the granting of the equitable relief herein prayed for.

Wherefore, the Plaintiff Union prays that:

1. The Defendant, Flair Builders, and its officers and agents be ordered to specifically perform and to adhere to the terms and provisions of the Agreement to which it is a party in any of its operations involving the performance of work covered by the Agreement in Will, Kendall, Grundy, Kane and Kankakee Counties, Illinois.

2. Judgment be rendered against the Defendant and in favor of the Plaintiff in the sum of One Hundred Thousand Dollars ($100,000.00).

3. The Plaintiff be granted such other relief as the Court may deem just and equitable.

Respectfully submitted,

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO,

.....,

Bernard M. Baum,

.....,

Daniel S. Shulman,

Attorneys for Plaintiff.

BERNARD M. BAUM,
DANIEL S. SHULMAN,
29 South La Salle Street,
Suite 350,
Chicago, Illinois 60603.

UNITED STATES DISTRICT COURT.
(Caption—68-C-2091)

MOTION TO STRIKE AND DISMISS.

Flair Builders, Inc., an Illinois corporation, by its attorneys, Murphy & Griffin and Defrees, Fiske, Voland, Alberts & Hoffman, respectfully moves the Court to enter its order striking certain portions of the Complaint herein, and to dismiss the Complaint herein, and in support hereof respectfully shows unto the Court:

1. There is no person or corporate entity such as is named defendant as "Flair Builders" in the complaint herein, but the summons herein having been served upon an officer or agent of Flair Builders, Inc., an Illinois corporation, this corporation appears specially and for the limited purpose of making this motion.

2. The complaint herein fails to state a claim upon which relief can be granted, in the following particulars:

(a) The complaint, together with the purported agreements thereto attached, shows upon its face that the so-called Agreement of Fox Valley General Contractors Association dated June 1, 1963, and by reference adopted by the purported Memorandum of Agreement between the Union and the Employer, expired May 31, 1966.

(b) As appears from the affidavit of Robert V. Richards hereto attached, Flair Builders, Inc., was never at any time a member of Fox Valley General Contractors Association, neither at the time of signing the purported Memorandum of Agreement dated May 12, 1964, nor at any time thereafter, and is not now a member of Fox Valley General Contractors Association.

(c) The purported Collective Bargaining Agreement between the Union and Fox Valley General Contractors Association, attached to the Complaint herein as Exhibit A, shows upon the face thereof that the same was adopted by the parties thereto "effective June 1, 1966" being a date subsequent to the date of purported memorandum of agreement attached as Exhibit B to the Complaint, and by its terms extends to and affects only said association and the members thereof.

(d) The provision appearing in paragraph 3 of the Memorandum of Agreement (Exhibit B to the Complaint) which purportedly adopts in advance "any Agreement entered into between the Union and Fox Valley General Contractor's Association" is void and of no legal effect whatsoever, since the said provision lacks mutuality, is indefinite and uncertain in time, effect and duration; and provides no legal or actual consideration for any subsequent agreement.

3. The complaint herein fails to state a claim upon which relief can be granted, in the following further particulars:

(a) As appears from the affidavit of Robert V. Richards hereto attached, the plaintiff Union at all times subsequent to May 12, 1964, and prior to June 1, 1966, abandoned the said purported Memorandum of Agreement and treated the same as null, void and of no effect whatsoever, so that upon the purported date of the Collective Bargaining Agreement of June 1, 1966 (Exhibit A to the Complaint), there was no contract between the plaintiff Union and Flair Builders, Inc., an Illinois corporation.

4. Paragraph 9 of the Complaint herein should be stricken, in that the purported enumeration of damages sustained by the Plaintiff Union shows on its face that the items listed were not damages sustained by the union but rather the individual damages (if any) of individual members of the union, for and upon which claims the plaintiff union has no legal authority or interest, and no power or authority to sue under Section 301 of the Labor Management Relations Act (29 U. S. C. 185 (a)) as amended. Further said Paragraph 9 seeks to recover punitive damages which are not allowable or recoverable under said Act.

5. Paragraph 11 of the Complaint herein should be stricken in that the same fails to properly allege facts but consists solely of the conclusions of the pleader, and further alleges irrelevant and immaterial matter not germane to the alleged cause of action.

6. Paragraph 11 of the complaint and item number 1 of the prayer for relief in the Complaint should be stricken, in that this Court has no jurisdiction under Section 301 of the Labor Management Relations Act (29 U. S. C. 185(a)) as amended, to grant specific performance or other affirmative compulsive orders in the premises.

7. Flair Builders, Inc., further and in the alternative, respectfully moves the Court for an order upon the plain-

tiff Union to make a more definite statement of the claim or cause of action sought to be pleaded by the Complaint herein, upon the following particulars:

(a) The Complaint is so vague and ambiguous that no defendant can reasonably be required to frame a responsive pleading thereto.

(b) Paragraph 7 of the Complaint alleges that "Defendant Company has continually violated the Agreement" by various general types of alleged conduct, but fails to specify any dates or occasions of alleged refusals which purportedly constitute the conduct complained of, fails to specify any named employees tendered to the defendant company by the "referral offices" of the Union and purportedly refused by defendant company; fails to specify any employees of defendant company to whom any purported wage scale should have been paid; fails to specify any employees for whose benefit "fringe benefits" should have been contributed or maintained, and fails to specify any periods of time in which such wages or benefits were allegedly refused by defendant company.

(c) Paragraph 9 of the Complaint fails to allege any specific items of compensatory damages allowable to the plaintiff Union, fails to allege wherein the plaintiff Union has been damaged in any way which might be reasonably answerable by the defendant company.

Wherefore, Flair Builders, Inc. respectfully moves the Court:

(1) To dismiss the Complaint for failure to properly make Flair Builders, Inc. a party thereto.

(2) To dismiss the Complaint for failure to state a claim upon which relief can be granted.

(3) To enter its order striking from the Complaint paragraphs 9 and 11 and items 1 and 2 of the prayer for relief.

(4) To enter its order directing the plaintiff to make a more definite statement of the claim or cause of action, and in particular to make a more definite statement of the manner or particulars in which defendant company is alleged to have violated an agreement, and a more definite statement of the items of compensatory damages alleged to have been sustained by the plaintiff union.

Respectfully submitted,

FLAIR BUILDERS, INC., AN ILLINOIS CORPORATION,
By MURPHY & GRIFFIN,
per /s/ J. R. MURPHY,
and by DEFREES, FISKE, VOLAND, ALBERTS & HOFFMAN,
per /s/ EDWARD J. GRIFFIN.
Attorneys for Flair Builders, Inc.

MURPHY & GRIFFIN,
340 North Lake Street,
Aurora, Illinois 60506,
Telephone 896-9711,

DEFREES, FISKE, VOLAND, ALBERTS & HOFFMAN,
105 South LaSalle Street,
Chicago, Illinois 60603,
Telephone FR 2-4000.

IN THE UNITED STATES DISTRICT COURT.
* * (Caption—68-C-2091) * *

MEMORANDUM OPINION.

Flair Builders allegedly agreed to a collective bargaining contract with Local 150 of the International Union of Operating Engineers whereby the latter became the exclusive representative of the former's employees. The union seeks an injunction ordering the company to comply with the agreement's terms.[1] In response, Flair asks that the complaint be dismissed for failure to state a cause of action.[2] Since section 8 of the Norris-LaGuardia Act, 29 U. S. C. § 108, bars the requested relief, I grant the defendant's motion.

The collective bargaining agreement relied on by plaintiff contains the following arbitration provision:

> "'Should any difference arise between the parties hereto which cannot be settled by their representatives, within 48 hours of the occurrence, such difference shall

1. The union also requests $100,000 in damages which it has supposedly suffered. But, the asserted damages only cover injury which may have been inflicted upon individual employees, such as lost wages and fringe benefits. Despite Flair's explicit request, Local 150 has not specified how it has been directly hurt. The union thus seems to be seeking exemplary damages which are not allowed. See, *e.g.*, *Local 127, United Shoe Workers* v. *Brooks Shoe Mfg. Co.*, 298 F. 2d 277, 278 (3rd Cir. 1962); *Food and Service Trades Council* v. *Retail Associates*, 115 F. Supp. 221, 226-227 (N. D. Ohio 1953).

2. The company also argues strenuously that (1) no contract was ever created, and (2) that if consummated, the agreement was subsequently abandoned by the union. In light of the union's opposing affidavits, these contentions raise *factual issues* which cannot be decided on a motion to dismiss or a motion for summary judgment.

> be submitted to arbitration. . . . The decision of the Arbitration Board shall be final, binding and conclusive on all parties to the arbitration."

Despite the contract's explicit language, apparently neither side has sought arbitration.

Section 8 of the Norris-LaGuardia Act provides that:

> "No restraining order or injunctive relief shall be granted to any complainant . . . who has failed to make every reasonable effort to settle such dispute either by negotiation or . . . voluntary arbitration."

As explained by the Supreme Court in *Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50, 63 (1944):

> "Respondent is free to arbitrate or not, as it chooses. But if it refuses, it loses the legal right to have an injunction issued by a federal court . . . It is compulsory choice between the right to decline arbitration and the right to have the aid of equity in a federal court."

Compare *Elgin, J. & E. Ry. Co.* v. *Brotherhood of Railway Trainmen*, 302 F. 2d 540, 544 (7th Cir. 1962).

Furthermore, section 7 of the Norris LaGuardia Act prohibits injunctive relief unless:

> "[U]nlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, . . . [and unless] substantial and irreparable injury to complainant's property will follow."

There is some question whether the asserted violations constitute unlawful actions; similarly, irreparable harm might not be threatened. See, *e.g.*, *International U. of E., R. & M. Workers* v. *General Electric Co.*, 341 F. 2d 571, 572 (2nd Cir. 1965); *N. L. R. B.* v. *C & C Plywood Corp.*, 385 U. S. 421, 429 n. 15 (1967). Compare *Publishers Assn. of New York City* v. *New York Mailer's Union*, 317 F. 2d 624, 627 (2nd Cir. 1963); *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195 (1962).

Since the only relief properly pleaded in the complaint is barred by the Norris-LaGuardia Act, the complaint fails to state a cause of action.

As an additional issue, the briefs suggest that the parties' primary controversy is whether a "memorandum of agreement," executed prior to the master contract now in force, constitutes a binding collective bargaining agreement. Since this dispute is covered by the arbitration section, it should be submitted to a Board of Arbitrators. After the arbitrators have ruled, of course, either party may petition the federal courts for enforcement. See *e.g., Textile Workers* v. *Lincoln Mills,* 353 U. S. 448 (1957); *Steelworkers* v. *American Mfg. Co.,* 363 U. S. 564 (1960); *Steelworkers* v. *Warrior and Gulf Co.,* 363 U. S. 574 (1960); *Steelworkers* v. *Enterprise Corp.,* 363 U. S. 593 (1960).

Accordingly, I have entered an order today dismissing the complaint for failure to state a cause of action.

ENTER:

/s/ BERNARD M. DECKER,
United States District Judge.

Dated: April 14, 1969.

BEFORE THE UNITED STATES DISTRICT COURT.

(Caption—68-C-2091)

MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT.

International Union of Operating Engineers, Local 150, AFL-CIO, by its attorneys, Bernard M. Baum and Daniel S. Shulman, respectfully move this Court for an Order permitting the Plaintiff to file its First Amended Complaint for the following particulars:

1. That this Court, in its Memorandum of Opinion, filed

on April 14, 1969, in the above captioned matter, stated that the "primary controversy" between the parties, to-wit: whether the Memorandum of Agreement constitutes a binding Collective Bargaining Agreement, should be submitted to arbitration.

2. That on April 18, 1969, the Plaintiff Union, made a demand upon the Defendant Company for immediate arbitration pursuant to the Court's Opinion.

3. That on May 1, 1969, the Defendant Company refused to submit to abide by the Plaintiff Union's demand for arbitration.

4. By reason of the matters of fact aforesaid, the Plaintiff Union believes that it is entitled to relief in accordance with the additional facts contained in the First Amended Complaint, a copy of which is attached hereto.

Wherefore, the Plaintiff Union respectfully prays for leave to file its First Amended Complaint against the Defendant Company for the purpose of alleging the matter of fact aforesaid and praying for such other relief as may be proper.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO,

By: .....
Bernard M. Baum

By: .....
Daniel S. Shulman

SHULMAN AND BAUM,
Attorneys for Plaintiff,
29 South La Salle Street,
Chicago, Illinois 60603,
CEntral 6-4316.

UNITED STATES DISTRICT COURT,

Northern District of Illinois,

Eastern Division.

Name of Presiding Judge, HONORABLE BERNARD M. DECKER

Cause No. 68 C 2091 Date June 3, 1969

Title of Cause International Union Operating Engineers *vs.* Flair Builders, Inc.

Leave given Pltff to file first amended complaint, DECKER *J.*

BEFORE THE UNITED STATES DISTRICT COURT.

(Caption—68-C-2091)

FIRST AMENDED COMPLAINT.

Now comes the Plaintiff, International Union of Operating Engineers, Local 150, AFL-CIO (hereinafter referred to to the "Plaintiff Union"), by its attorneys, Bernard M. Baum and Daniel S. Shulman, and amends the Complaint in this action, so that the same will read as follows:

1. This Court has jurisdiction of this case by reason of the Labor Management Relations Act, 1947, Title III, Section 301, 61 Stat. 156, 29 USC 185(a), as amended.

2. The Plaintiff Union is, and at all times hereinafter mentioned, was a voluntary association and labor organization, engaged in representing employees for the purposes of collective bargaining in the State of Illinois, and specifically in Will, Kendall, Grundy, Kane and Kankakee Counties, Illinois.

3. The Defendant Company is an employer in the construction industry in the State of Illinois.

4. Effective June 1, 1966, the Plaintiff Union entered into a Collective Bargaining Agreement (hereinafter referred to as the "Agreement") with the Will County Contractors, Chicago Outer Belt Contractors Association and the Fox Valley General Contractors Association and the individual members thereof, which Agreement covers Will, Kendall, Grundy, Kane and Kankakee Counties, Illinois. A copy of said Agreement is attached hereto as Plaintiff Union's Exhibit A and made a part hereof.

5. Effective May 12, 1964, the aforesaid Defendant Company became a party to said Agreement (Exhibit A) by signing a Memorandum of Agreement (hereinafter referred to as the "Memorandum" with the Plaintiff Union. A copy of said Memorandum is attached hereto as Plaintiff Union's Exhibit B and made a part hereof.

6. Said Memorandum specifically adopts and incorporates the aforementioned agreement, pursuant to Paragraph 3 of the Memorandum.

7. Since June 1, 1966, the Defendant Company has continually violated the Agreement by conduct including but not limited to: the refusal to hire employees through the Referral Offices of the Local Union for the performance of work covered by the Agreement; the refusal to pay the wage scale set forth in the Agreement; the refusal to contribute to and maintain employee fringe benefits, and a general refusal to abide by and adhere to any of the terms of the Agreement.

8. The Plaintiff Union, through its officers and agents, has demanded on numerous occasions that the Defendant Company adhere to the provisions of the Agreement in its operations as a contractor; however, the Defendant Company has refused to comply with such demands.

9. That said Collective Bargaining Agreement sets forth in Article II, Section 1, a provision for arbitration as follows:

> Section 1. Arbitration. Should any difference arise between the parties hereto which cannot be settled by their representatives, within 48 hours of the occurrence, such difference shall be submitted to arbitration. Each side shall select two arbitrators other than the representatives who failed to agree and the four arbitrators shall select a fifth arbitrator. Such Board of Arbitrators shall meet within six (6) days and a decision of the majority of this Board shall be accepted by both parties. In the event the parties cannot agree upon a fifth arbitrator, each side shall jointly request the American Arbitration Association to submit a panel of seven (7) recognized arbitrators and by the striking of names, the parties shall arrive at the name of an arbitrator. The parties shall draw straws to determine who shall strike the first name. The expenses of the arbitrator shall be borne equally by both sides. The decision of the Arbitration Board shall be final, binding and conclusive on all parties to the arbitration. There shall be no stoppage of work by the Union or Employer for a period of fifteen (15) days after notice.

10. That on April 14, 1969, this Court, in dismissing the initial Complaint of Plaintiff, stated in its "Memorandum of Opinion" that the disputes existing between the Plaintiff and Defendant, more specifically, the dispute concerning controversy of whether a "Memorandum of Agreement" executed prior to the Master Contract now in force, constitutes a binding Collective Bargaining Agreement, should be submitted to arbitration pursuant to the terms of the Collective Bargaining Agreement.

11. Thereafter, on April 18, 1969, the Plaintiff Union made a written demand upon the Defendant Company for arbitration of the aforementioned issues. A copy of said

letter is attached hereto as Plaintiff Union's Exhibit C and made a part hereof.

12. That on May 1, 1969, the Defendant Company, through its attorneys and agents, informed the Plaintiff that it refused the Plaintiff Union's demands for arbitration.

Wherefore, the Plaintiff Union prays that the Court specifically enforce the aforementioned Collective Bargaining Agreement in that the Defendant Company, Flair Builders Inc., be ordered to submit to arbitration the issues raised by the Plaintiff Unions demand, and the issue set forth by the Court in its Memorandum of Opinion, being whether the "Memorandum of Agreement" executed prior to the current Master Collective Bargaining Agreement now is in force and constitutes a binding Collective Bargaining Agreement.

2. That judgment be rendered against the Defendant Company in favor of the Plaintiff Union, and

3. The Plaintiff Union be granted such other relief as the Court may deem just and equitable.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO,
Plaintiff,

By: .....
Bernard M. Baum

By: .....
Daniel S. Shulman

SHULMAN AND BAUM
Attorneys for Plaintiff
29 South LaSalle Street
Chicago, Illinois 60603
CEntral 6-4316.

Exhibit B.

MEMORANDUM OF AGREEMENT.

466-5371

This Agreement made and entered into by and between Flair Builders Inc., Box 252, Sugar Grove, Ill., hereinafter referred to as the "Employer", First Party, and Local 150, International Union of Operating Engineers, hereinafter referred to as the "Union", Second Party.

This Agreement is made in consideration of the mutual promises of the First and Second Parties and the parties do hereby agree as follows:

1. The Employer recognizes the Union as the sole and exclusive bargaining representative for and on behalf of the employees of the Employer within the territorial and occupational jurisdiction of the Union.

2. The Parties do hereby adopt the Agreement dated June 1, 1963 by and between the Union and the Fox Valley General Contractors Assoc. and the parties do hereby mutually agree to be bound by the terms and conditions of the Agreement, the Health and Welfare Trust, and the Pension Trust; including the per hour contributions provided therein, and the Trust Agreement creating same.

3. This Agreement and the adoption of the Agreement and Trusts referred to in paragraph 2 above, shall be effective as of May 12, 1964, and remain in effect to and including the expiration date of the Agreement adopted herein. This Agreement shall continue in effect from year to year thereafter and specifically adopt any Agreement entered into between the Union and Fox Valley General Contractors Assoc. subsequent to the expiration date of the Agreement herein adopted unless notice of termination or amendment is given in the manner provided herein.

4. Either Party desiring to amend or terminate this Memorandum of Agreement must notify the other in writing at least three calendar months prior to the expiration of the Agreement adopted herein.

In Witness Whereof, the Parties have executed this Memorandum of Agreement the 12th day of May, 1964.

FLAIR BUILDERS INC.
Employer
By ROBERT W. RICHARDS
Pres.

LOCAL 150, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO
By WM. F. MARTIN
GLENN E. STONE
A. J. MEAGHER

Exhibit C.

April 18, 1969

Mr. Edward J. Griffin
Defrees, Fiske, Voland, Alberts and Hoffman
105 South LaSalle Street
Chicago, Illinois 60603

RE: International Union of Operating Engineers
—Local 150 *vs.* Flair Builders

Dear Mr. Griffin:

We have been advised pursuant to the Court Memorandum that the issues pending before the Court concerning the applicability of the contract and the subsequent issues of possible violations should be submitted to arbitration pursuant to the arbitration provision of the Collective Bargaining Agreement between the Union and the Company to which we allege the Company as a party pursuant to a Memorandum of Agreement effective May 12, 1964.

Please consider this letter a demand for immediate arbitration of those issues. We request an immediate reply. In the event that we do not have any response from you within ten (10) days, we shall assume that you refuse to abide by our demand for arbitration.

In such event, we shall take appropriate action to bring the matter before Judge Decker for enforcement of the issues as set forth in his Memorandum and request immediate enforcement of the demand for arbitration.

Very truly yours,
Shulman, Baum, and Marcus
Bernard M. Baum.

BMB/kp

UNITED STATES DISTRICT COURT.
(Caption—68-C-2091)

MOTION TO DISMISS FIRST AMENDED COMPLAINT.

Flair Builders, Inc., an Illinois corporation, defendant, by its attorneys Edward J. Griffin and J. Robert Murphy, respectfully moves the Court to enter its order dismissing the First Amended Complaint filed herein by plaintiff, International Union of Operating Engineers, Local 150, AFL-CIO; and in support of this Motion the defendant respectfully shows unto the Court:

1. The First Amended Complaint fails to state a cause of action upon which relief can be granted, since on the face of the said Complaint it appears that the plaintiff seeks to have determined by arbitration an issue that must be determined by this Court, namely, whether the alleged Collective Bargaining Agreement is valid and binding.

2. The First Amended Complaint fails to state a cause of action on which relief can be granted, since on the face of said Complaint it appears that any claim or demand of the plaintiff is stale, frivolous and patently baseless, in that the alleged demand for arbitration affirmatively appears to have been made almost three years after the alleged violation of the alleged Collective Bargaining Agreement.

3. The First Amended Complaint fails to state a cause of action on which relief can be granted in that there has been no judicial determination of the validity and binding force of the alleged Collective Bargaining contract, and

before arbitration can be ordered it is imperative for the Court to determine its validity; however, the First Amended Complaint seeks no such determination but merely an order or judgment directing that arbitration be had by way of specific performance of the alleged agreement.

4. The First Amended Complaint fails to state a cause of action on which relief can be granted, in the following further particulars:

(a) It affirmatively appears on the face of said Amended Complaint that the plaintiff union has been guilty of laches in attempting any enforcement whatsoever of the alleged agreement, and of laches in requesting arbitration thereunder. On the face of the Amended Complaint the lapse of time is clearly indicated to have been at least since June 1, 1966, but by reference of the original Complaint herein, and the affidavits submitted by the plaintiff itself, it appears that the alleged "violations" on the part of the defendant have occurred almost continuously since the date of the "Memorandum of Agreement" dated May 12, 1964—a lapse of approximately five years.

(b) The First Amended Complaint (paragraph 9) purports to quote the provision for arbitration contained in said alleged Collective Bargaining agreement. Even assuming for the purpose of argument that the agreement is in any way binding upon the defendant, this provision has admittedly according to the Amended Complaint been violated by the plaintiff, in its failure to proceed to arbitration within 48 hours of any alleged occurrence; and further the said provision calls for a board of arbitrators to meet within six days, compliance with which has been made impossible by the delays, laches, and neglect on the part of the plaintiff.

Wherefore, the defendant, Flair Builders, Inc., respectfully moves the Court to enter its order dismissing the First Amended Complaint for failure to state a claim on which relief can be granted.

Respectfully submitted,

FLAIR BUILDERS, INC., AN ILLINOIS CORPORATION, BY

/s/ EDWARD J. GRIFFIN
EDWARD J. GRIFFIN
and

/s/ J. ROBERT MURPHY,
J. ROBERT MURPHY,
Its Attorneys.

Of Counsel:
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IN THE UNITED STATES DISTRICT COURT.

* * (Caption—68-C-2091) * *

MEMORANDUM OPINION.

The plaintiff union's complaint requests that the parties' labor relations dispute be submitted to arbitration. Apparently acknowledging that the alleged contract requires arbitration, the employer defendant maintains that it never consented to the collective bargaining agreement. Prior to compelling arbitration, a federal district court must determine whether the parties contractually agreed to submit their controversy to arbitration. See *John Wiley & Sons* v. *Livingston*, 376 U. S. 543, 546-547 (1964); *Mogge* v. *District No. 8, I. A. M.*, 387 F. 2d 880, 882 (7th Cir. 1967).

In its motion to dismiss, defendant asserts that the first amended complaint prevents this court from resolving the preceding threshold question. The original complaint and plaintiff's recent memorandum of law indicate, however, that the union realizes that this court should first determine the appropriateness of arbitration.

Defendant also claims that the cause of action is stale and barred by laches. In *John Wiley & Sons* v. *Livingston*, 376 U. S. 543, 557 (1964), the Supreme Court explained that:

> "Once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions [as well as substantive issues] which grow out of the dispute and bear on its final disposition should be left to the arbitrator."

Therefore, if the employer consented to the alleged collective bargaining agreement, the laches issue should be decided by the arbitrator rather than the federal courts.

Accordingly, I have entered an order today (1) denying the motion to dismiss and (2) scheduling an evidentiary hearing for Friday, September 12, 1969 at 2:00 P. M. to consider which issues, if any, the employer agreed to arbitrate.

Enter:

BERNARD M. DECKER,
United States District Judge.

Dated: August 26, 1969.

UNITED STATES DISTRICT COURT.
(Caption—68-C-2091)

ANSWER TO FIRST AMENDED COMPLAINT.

The defendant, Flair Builders, Inc., by its attorneys, Edward J. Griffin and J. Robert Murphy, answers the First Amended Complaint of plaintiff, International Union of Operating Engineers, Local 150, AFL-CIO, as follows:

1. Defendant admits that this Court has jurisdiction of this case as alleged in paragraph 1 of the First Amended Complaint.

2. Defendant admits the allegations of paragraph 2 of the First Amended Complaint.

3. Defendant admits the allegations of paragraph 3 of the First Amended Complaint.

4. Defendant has no knowledge of the alleged Agreement described in paragraph 4 of the First Amended Complaint, having not been a party thereto, and therefore denies the allegations of said paragraph and denies the materiality thereof.

5. Defendant admits that it signed a Memorandum of Agreement as alleged in paragraph 5 of the First Amended Complaint, but denies that the defendant became a party

to the alleged Collective Bargaining Agreement between the Plaintiff Union and the Fox Valley General Contractors Association, if any.

6. Defendant denies the allegations of paragraph 6 of the First Amended Complaint.

7. Defendant denies the allegations of paragraph 7 of the First Amended Complaint.

8. Defendant denies the allegations of paragraph 8 of the First Amended Complaint.

9. Referring to paragraph 9 of the First Amended Complaint, defendant denies that the Collective Bargaining Agreement therein referred to (being Plaintiff's Exhibit A, dated "effective June 1, 1966") has any binding force or effect as regards this defendant; and further denies that the section quoted by said First Amended Complaint is completely set forth.

10. Referring to paragraph 10 of the First Amended Complaint defendant admits that the Memorandum of Opinion filed by this Court April 14, 1969, contained the statement alleged; but further answering said paragraph, defendant states that the subsequent Memorandum Opinion filed by this Court August 26, 1969, made it clear that the Court had retained the jurisdiction and power to first determine the threshold question of whether a contractual relationship existed between the parties whereby they had agreed to submit their controversy to arbitration.

11. Defendant admits that counsel for Plaintiff Union sent the letter described in paragraph 11 of the First Amended Complaint to counsel for defendant, but denies that the letter in question constituted a proper written demand for arbitration, and further denies that the Plaintiff Union was then or at any time entitled to demand and obtain arbitration.

12. Defendant admits that its counsel refused the Plaintiff Union's demand for arbitration.

Further Defenses

1. The Memorandum of Agreement dated May 12, 1964 (Exhibit B to the First Amended Complaint), was obtained by Plaintiff Union under such oppressive and misleading circumstances, and for such limited purposes, as to constitute no contractual relationship whatsoever, in the following particulars:

(a) At the date thereof defendant employed only one employee who could be considered as engaging in the occupations claimed by the Plaintiff Union, and that employee was not a member of the Plaintiff Union.

(b) On the date thereof the business agent of the Plaintiff Union threatened to cause a subcontractor of defendant's to leave the job site unless defendant's said employee became a union member.

(c) Upon such demand by Plaintiff Union's business agent, defendant, having no alternative, agreed to purchase at his expense for the account of the employee, the employee's initial membership and dues so that such employee would become a member of the Plaintiff Union. At no time during the transaction was there any discussion of the defendant becoming a party to any collective bargaining agreement, and the document entitled Memorandum of Agreement was presented to the defendant and represented solely as a paper necessary to entitle defendant's employee to membership in the Plaintiff Union.

2. At the date of said Memorandum of Agreement, the collective bargaining agreement in force between the Plaintiff Union and the Fox Valley General Contractors Asso-

ciation was a collective bargaining agreement dated June 1, 1963, expiring May 31, 1966.

3. In the interim between May 12, 1964 (the date of the Memorandum of Agreement), and May 31, 1966 (the expiration date of the above-mentioned Collective Bargaining Agreement), the Plaintiff Union abandoned the purported contractual relationship with the defendant, and treated the same as null, void and of no effect, by the following particular actions:

(a) At no time during said period did any representative or agent of Plaintiff Union request any kind of compliance on the part of defendant.

(b) At no time during said period did Plaintiff Union tender the facilities of its referral offices for the furnishing of employees, nor advise the defendant of the wage scale, nor advise defendant of employee fringe benefits required, nor advise the defendant regarding contributions to any pension or welfare plans or trusts which would be expected.

(c) At no time during said period did Plaintiff Union or any of its representatives directly or indirectly communicate to defendant the notice or knowledge that any conduct in conformity with any contract was expected of defendant, and in fact if any agent of Plaintiff Union ever in that period visited the offices or job sites of the defendant, not one ever communicated his presence or desire to discuss matters to the defendant or any officer or agent of defendant.

4. Within a space of two weeks immediately subsequent to May 12, 1964, the employee in question, whose membership in Plaintiff Union the defendant had been required to purchase, left the employment of defendant.

From that date continuously until the summer of 1968 (immediately before the Plaintiff Union commenced this action), the defendant had no knowledge of whether any of its few employees were or should in any way have been members of Plaintiff Union, or subject to the job classification coverages claimed by Plaintiff Union, and no such knowledge was ever furnished in that period by the Plaintiff Union.

5. The defendant is not now, and never has been, a member of the Fox Valley General Contractors Association, nor of any other group of employers allegedly covered by the Collective Bargaining Agreements of the Plaintiff Union.

6. Accordingly, on and prior to the adoption of a new Collective Bargaining Agreement, if any, between the Plaintiff Union and the Fox Valley General Contractors Association, on or about June 1, 1966, the condition of abandonment had persisted for such a period of time that the Memorandum of Agreement between Plaintiff Union and this defendant, if it ever had been valid or existing, had already been terminated by Plaintiff Union, and could not in law or in fact make the defendant subject to a new Collective Bargaining Agreement.

7. Further, subsequent to the adoption of any Collective Bargaining Agreement effective June 1, 1966, the condition of abandonment persisted and continued, and the Plaintiff Union became and was guilty of laches in asserting any purported rights or claims thereunder.

Wherefore, the defendant Flair Builders, Inc., denies that the Plaintiff Union is entitled to any of the relief prayed in its First Amended Complaint herein, and prays that the Court will enter its finding and order that the

alleged contractual relationship between the parties is null, void and of no effect whatsoever, and enter judgment for the defendant with costs assessed against the plaintiff.

FLAIR BUILDERS, INC.,
Defendant,

by.....
Edward J. Griffin,

/s/ by J. ROBERT MURPHY,
J. Robert Murphy.

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UNITED STATES DISTRICT COURT
Northern District of Illinois
Judge's Chambers
Chicago 60604

BERNARD M. DECKER
Judge

October 29, 1969.

Messrs. Bernard M. Baum and
Daniel S. Shulman,
Shulman, Baum and Marcus,
29 South LaSalle Street,
Chicago, Illinois 60603

Mr. Edward J. Griffin,
DeFrees, Fiske, Voland,
Alberts and Hoffman,
105 South LaSalle Street,
Chicago, Illinois 60603

Mr. J. Robert Murphy,
Murphy and Griffin,
340 N. Lake Street,
Aurora, Illinois 60506

Re: International Union of Operating Engineers, Local 150, AFL-CIO *vs.* Flair Builders—No. 68 C 2091

Gentlemen:

Presently pending before me in this cause is the question whether the parties contractually agreed to submit their controversy to arbitration. Assuming that there is a valid collective bargaining agreement, it would be necessary to determine what disputed issues, if any, are covered by the arbitration clause. See the opinion of August 26, 1969.

Neither the plaintiff's pleadings nor the evidence ad-

duced at the hearing before me on October 24 sufficiently identify the disputes which the plaintiff seeks to submit to arbitration. For example, plaintiff's objection with regard to the deductions from the wages of one Jerry Rumsey remains unclear. Accordingly, the plaintiff by letter to this court within ten days should specify in some detail what violations of the purported agreement it seeks to arbitrate, and the time of their occurrence, in order that this matter may be promptly disposed of.

Very truly yours,

/s/ BERNARD M. DECKER,
United States District Judge.

November 6, 1969

The Honorable Bernard M. Decker
U. S. District Court
Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

Re: International Union of Operating Engineers, Local 150, AFL-CIO *vs.* Flair Builders, Inc.—Case No. 68 C 2091

Dear Judge Decker:

Pursuant to your request of October 29, 1969, please be advised that it is the Plaintiff's position in the above matter that the Defendant has been and is presently in total breach of the current master collective bargaining agreement (Plaintiff Union's Exhibit A). Paragraph seven (7) of the Plaintiff's First Amended Complaint indicates that the principal issues in dispute are the refusal of the Defendant to utilize the union hiring hall, the refusal of the

defendant to pay the wage scales as set forth in the agreement and the refusal to contribute to the fringe benefit funds as set forth in the agreement. Furthermore, it is the plaintiff's position that the Defendant has been in *continual violation* of the entire master collective bargaining agreement since June 1, 1966.

Accordingly, the Plaintiff now seeks to arbitrate the total violation of the entire agreement in question since the effective date of said agreement, June 1, 1966.

Sincerely yours,

SHULMAN AND BAUM

By .....
Bernard M. Baum

By .....
Daniel S. Shulman

BMB:bg

UNITED STATES DISTRICT COURT.
(Caption—68-C-2091)

MEMORANDUM IN ANSWER TO COMMUNICATION OF PLAINTIFF'S COUNSEL.

Defendant, Flair Builders, Inc., by Edward J. Griffin and J. Robert Murphy, its attorneys, respectfully submits this memorandum for the consideration of the Court.

On October 24, 1969, this cause came on for an evidentiary hearing before the Honorable Bernard M. Decker, Judge. On that date proofs were heard and the matter taken under advisement.

On October 29, 1969, the Court on its own motion requested plaintiff within ten days to "specify in some detail what violations of the purported agreement it seeks to arbitrate, and the time of their occurrence."

Plaintiff's counsel by letter dated November 6, 1969, responded to the Court's request. Defendant's counsel were not advised of, nor furnished copies of, this letter, until on their own inquiry November 14, 1969, it was ascertained that such letter had been submitted to the Court.

While it may be that in the interim the Court has reached its decision, we respectfully pray leave to file this memorandum to respond to counsel's letter.

1. Counsel's Letter Confirms Defendant's Defense of Abandonment

Counsel's letter claims a "total breach" of the Memorandum of Agreement dated May 12, 1964, but mentions only a "continual violation since June 1, 1966."

What of the Union's own evidence regarding the alleged violation in connection with employee Rumsey, who quit two

weeks after May 12, 1964? This was a claimed violation which occurred more than two years before the Collective Bargaining Agreement of 1966; yet no action, no effort to follow grievance or arbitration procedures was taken by the Union.

The Memorandum of Agreement was totally abandoned by the Union *before* 1966. The abandonment continued to 1967 by the Union's own testimony. In fact, it continued into 1968, since the first visits of the Union agent were to a job site on the West side of the highway—an area not begun until 1968.

2. The Union's Abandonment Leaves No Issue for Arbitration

Counsel's letter further confirms that no specific arbitrable issue can be claimed by the Union.

The arbitration clause set forth in the Union's amended complaint herein clearly contemplates specific "differences . . . which cannot be settled by their representatives, within 48 hours of the *occurrence*," but Counsel's letter points to no occurrences, only a "continual violation."

The record is devoid of any evidence of a Union request for compliance, until 1968 or 1967 at the earliest. No demand was made, none was refused. Counsel's letter characterizes the situation as "refusal" to use the hiring hall, "refusal" to pay wage scales and benefits, etc. In fact, no difference between the parties existed because the Union had treated the contract as non-existent.

This can only be explained as a logical extension and continuation of a condition of no existing contract—a paper signed years before, abandoned by the Union, and sought to be revived by this action.

The Court has before it the "threshold question" of whether there is a valid and subsisting contract to arbitrate.

Union counsel's letter confirms our consistent position that no such contract existed when this action was commenced. Were it not for the oppressive effect of the Union's action we would urge that a consideration of the factual background leads to the inescapable conclusion that the action is frivolous. Lacking proof of any substantial matters, the Union has asked the Court to permit it to arbitrate the same matters which make up the threshold question of the case.

Respectfully submitted,

FLAIR BUILDERS, INC.
By /s/ EDWARD J. GRIFFIN
Edward J. Griffin
and /s/ J. ROBERT MURPHY
J. Robert Murphy

Attorneys of Counsel:
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IN THE UNITED STATES DISTRICT COURT.

(Caption—68-C-2091)

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Bernard M. Decker, one of the Judges of said Court, in his courtroom at the United States Courthouse, Chicago, Illinois, on Friday, October 24, 1969, at the hour of 2:00 o'clock, p.m.

Present:

Mr. Baum, Mr. Shulman, on behalf of the Plaintiff;
Mr. Murphy, Mr. Griffin, on behalf of the Defendant.

[2] The Clerk: 68 C 2091, International Union of Operating Engineers, Local 150, AFL-CIO v. Flair Builders, Incorporated; for evidentiary hearing.

The Court: Good afternoon, gentlemen.

Mr. Baum: Good afternoon, your Honor.

Mr. Murphy: Good afternoon, your Honor.

The Court: Who has the laboring oar here?

Mr. Griffin: We hope that it is the other side.

Mr. Baum: We are ready to proceed.

The Court: You are ready to proceed?

Mr. Baum: Yes, your Honor.

The Court: All right. I will hear you.

Mr. Griffin: Your Honor, before we start, may I introduce Mr. Murphy to the Court.

I have been here before, before the Court, on motions, but Mr. Murphy is from Aurora and is admitted to this Court and will be handling the case on behalf of defendant.

The Court: All right. I will be pleased to hear from him.

Mr. Baum: In the same regard, your Honor, I would like to introduce Mr. Daniel Shulman—

The Court: Mr. Shulman.

Mr. Baum; Mr. Shulman is an attorney from my [3] office, my firm, who will be assisting me in this case.

The Court: All right. I am pleased to meet you.

The Reporter: Your name, counsel?

Mr. Baum: Robert Baum; B-a-u-m.

The Court: Perhaps if you made a brief opening statement you could bring me up to date. I assume that we are here to make an attempt to prove the existence of an agreement which contained an arbitration clause.

Mr. Baum: I think that this is substantially the case, your Honor.

We filed an amended complaint, I believe, in April of 1968, asking for arbitration, in accordance with the provisions of a collective bargaining agreement and I believe that the primary issue now in dispute is whether that collective bargaining agreement is in fact in existence and is binding upon the defendant.

The Court: Yes; that's what I understand the issue to be.

Mr. Baum: Thank you, your Honor.

I call to the stand Mr. Ambrose Meagher.

The Court: If the Court please, before the witness takes the stand, may I ask that the Court entertain a motion to exclude witnesses who are not [4] officers of the parties.

The Court: That's agreeable. Any witnesses who are going to testify—not officers of the parties—

Mr. Baum: Not an officer, but we have two officers; can they both be here?

The Court: I have no objection.

Mr. Murphy: That is agreeable with us.

The Court: That's agreeable.

The witness may take the stand.

(Whereupon, the witness was duly sworn.)

AMBROSE J. MEAGHER, called as a witness by the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Baum.

Q. Would you state your full name, please, sir.
A. Ambrose J. Meagher.
Q. How do you spell your last name?
A. M-e-a-g-h-e-r.
Q. Where do you live, Mr. Meagher?
A. 213 South 19th Street, St. Charles, Illinois.
Q. What is your business or occupation?
A. I am a business representative of the [5] Operating Engineers, Local 150.
Q. How long have you so been a business representative of Local 150?
A. A little better than 7 years.
Q. Is Local 150 the plaintiff in this case?
A. Yes, it is.
Q. What kind of a union is Local 150, if you know?
A. It is a craft union.
Q. It is a craft union?
A. Yes.
Q. And what type of industry does this union represent? I mean, as to employees?
A. The construction industry.
Q. And what type of employees does your Local represent?
A. Heavy construction equipment operators.
Q. Now, can you tell us where your office is located?
A. Room 302 in the Tower Building, Elgin, Illinois.
Q. And where is the main office of Local 150 located?
A. 5440 South Cicero Avenue, Chicago.

[6] Q. Now, Mr. Meagher, can you tell us what are your duties as a business representative?

A. My duties primarily are enforcing the collective bargaining agreement, answering complaints and settling disputes on the job.

Q. All right. Can you tell us what territory you are responsible for in carrying out your duties as a business representative?

A. I cover DuPage County south of Roosevelt Road and west of Route, 53, Kane and Kendall Counties.

Q. Now, can you tell us approximately how many contractors are working in that area today.

A. Oh, I would guess that there are 200, 300, at least.

Q. All right. Calling your attention to the year 1964, could you tell us, if you know, about how many contractors were working in your area.

A. Well, over 200.

Q. And calling your attention to the year 1964, could you also tell us about how many contractors were working in your area?

A. Well, the way that the work has been increasing, it has been increasing about, I would say about 50 contractors a year, 40, 50 contractors a year.

[7] Q. So how many would you estimate in 1965?

A. In 1965?

Q. Yes.

A. Oh, 250, 300.

Q. Calling your attention to the year 1966, could you tell us how many contractors, approximately, were working in your area.

A. Oh, from 250 to 300, somewhere in that area.

Q. Calling your attention to the year 1967, could you tell us how many contractors were working in your territory?

A. I would say it would be over 300.

Q. And in 1968?

A. Oh, possibly 350.

Q. All right. Mr. Meagher, as part of your duties, do you have occasion to visit job sites of contractors working in your territory?

A. I do.

Q. And can you tell us the normal circumstances under which you might make these visits to contractors.

A. Well, as a rule we get called out on complaints; most of our time is spent chasing down complaints; when we get the opportunity, we visit different job sites and check them out, see who is working there.

[8] Q. All right. What kind of complaints do you receive, if you know?

A. Well, we receive complaints that men are not being paid properly, the contractor isn't living up to the agreement, there are non-union people working on the job; various types of complaints like this.

Q. When you receive a complaint, what do you do, if anything?

A. Visit the job site, see if we can't settle it.

Q. All right. Mr. Meagher, are you familiar with Flair Builders, Incorporated, the defendant in this case?

A. Yes, I am.

Q. Do you know where Flair Builders, Incorporated, is located?

A. Most of their work is in Sugar Grove, Illinois.

Q. Now, would that be within the territory that you cover as a business agent?

A. Yes; it is in Kane County.

Q. And what type of business is Flair Builders, Incorporated, involved in, if you know?

A. Primarily home building.

Q. And in their business of home building, what types

of equipment does Flair Builders, Incorporated, [9] utilize, if you know?

A. At the present time I believe that they have got a couple of high lifts, a couple of backhoes, pull shovels, and, I think that they have a blade, a grader. Also I think that they have a combination front end loader and backhoe.

Q. Is this the type of equipment that operating engineers would operate?

A. It is, yes.

Q. Now, calling your attention to the year 1964, did you have any occasion to visit Flair Builders, Incorporated?

A. Yes, I did.

Q. And could you tell us, when was the first time during 1964 that you had any contact with Flair Builders, Incorporated?

A. As I recall, it was in May of 1964.

Q. Can you tell us the circumstances surrounding that incident.

A. I got a complaint that there was a non-union operator running a piece of heavy equipment on the job in Sugar Grove.

Q. What did you do?

A. Well, I checked the job out. There was an [10] operator, his name was Rumsey operating a, if I recall, it was a high lift for Flair Builders.

Q. All right. Did you have a conversation with Mr. Rumsey?

A. Yes, I did.

Q. Who was present?

A. Mr. Rumsey and myself.

Q. Where was that conversation held?

A. On the job site in Sugar Grove.

Q. Can you tell us who said what to whom, if anything.

Mr. Murphy: I object, your Honor. It is out of the—

The Court: If you will just rise to make your objection, I can then identify you.

Mr. Murphy: Certainly, your Honor. I am sorry.

The Court: Then I can determine where you are in the courtroom.

Mr. Murphy: All right. I am sorry. I would have to object to that question on the ground that it calls for hearsay. It is a conversation outside the presence of the defendant.

[11] The Court: Well, I am sure that it is not binding on the defendant; I am going to permit it to go in.

I will determine later on what effect it may have, if any; I mean, I will show your objection.

Mr. Murphy: Thank you, your Honor.

The Court: It may be admitted.

What did he say and what did you say?

By Mr. Baum:

Q. Answer the question, please.

A. I went over to Mr. Rumsey and asked him if he belonged to the Operating Engineers Local 150 and he replied that he did not.

So I asked if he belonged to any union; he said that, "No," he did not.

So I told him, I said, "It is normally the occupational jurisdiction of the Operating Engineers to operate this type of equipment that you are running here."

I said, "Did anybody ever approach you on joining the union?" He said, "No."

I said, "Well, if you are going to continue to make a livelihood running heavy equipment," I said, [12] "you should belong to Local 150."

Well, he said that he didn't have any objection to belonging to the union.

Q. What happened next, if anything?

A. Well, then I went over and I seen Mr. Richards, the president of Flair Builders and also a Mr. Davis was there at the time.

Q. Is Mr. Richards sitting in this courtroom here today?

A. Yes, he is.

Q. Could you point him out to us, please.

A. He is sitting on the far side of the table (indicating).

Q. All right. Where did you talk with Mr. Richards, if you know?

A. On the job site in Sugar Grove.

Q. And this was on the same day?

A. Yes.

Q. And who was present at that conversation?

A. Mr. Davis, Mr. Richards and myself.

Q. And can you tell us who said what to whom, if anything.

A. Well, I told Mr. Richards that I talked to his man, his operator on the high lift, and he wasn't— [13] he didn't have anything against joining the union.

I asked him if he would sign an agreement with us to pay the man the wages and the health and welfare and the union.

He said, "No, I never been union before," he said, "I don't know why I should be now."

So Mr. Davis—he is the president of the Davis Construction Company from Plano, Illinois, he was there; he had men on the job and he was doing a water main job there. He had about 5 or 6 operators. So he said, "Well, I have been union," he said, "for the last eight, ten years and it has not caused me any trouble." He said, "All of my operators have been union. I don't see why you should object to joining the union."

So, then, after a little more conversation there, we was

differing, you know, as to what the wages were, the conditions, and stuff, if he did go union, and he agreed to sign the agreement.

Q. All right. What happened next, if anything?

A. Then I went over to the car and got a memorandum of agreement and a copy of the master agreement. I brought it back over and give Mr. Richards a copy of the collective bargaining agreement that covered [14] that area and I also gave him the memorandum to read.

He read them over and he signed them.

Q. What happened next—

A. He signed the memorandum, that is.

Q. What happened next, if anything?

A. Well, then I went over and told the operator Rumsey —oh, then, I have forgotten, I am getting ahead of myself; he agreed to pay Rumsey's, advance Rumsey the initiation fee, the fee for his card, which was, as I recall, around $175 at that time.

So, he give me a check for the initiation fee and I made out a receipt and I brought it over and I give it to Rumsey and told him that he was now a member of Local 150; I told him that he was going to get the wages and Flair Builders was going to pay his health and welfare and pension.

Q. What did you do with the agreement, if anything?

A. I took the agreement, brought it back to the office, sent it downtown for the president and the recording secretary to sign and to get the union seal on it. The original was mailed back to the contractor, Flair Builders.

Q. Now, you are referring to the memorandum?

[15] A. The Memorandum of Agreement, yes.

Q. All right. What happened to the master agreement?

A. The copy of it?

Q. Yes.

A. I gave a copy to Rumsey and I also gave a copy to Mr. Richards.

Q. All right. Now, Mr. Meagher, can you tell us what procedure, if any, does the union follow when a contractor is signed to a memorandum of agreement.

A. The union sends him back his copy, the original copy with the union with the officers' signatures on it with the union seal on it, and they also send him forms, health and welfare forms, pension forms, vacation forms, if any, that is, if any are in effect in that contract.

Q. Is this the customary business practice of the union?

A. It is standard procedure, yes.

Mr. Baum: Will you mark this as Plaintiff's Exhibit 1.

(Whereupon, the document was marked for identification as Plaintiff's Exhibit No. 1.)

[16] By Mr. Baum:

Q. Mr. Meagher, I now show you what I have marked as Plaintiff's Exhibit 1 for identification and ask you to look at it and ask you if you can identify it.

A. (Examining document.)

Yes; this is the building agreement that was in effect in Kane County at the time that Flair Builders signed the agreement with Local 150.

Q. And who were the parties to that agreement?

A. The contractor associations that signed the agreement are the Will County Contractors, the Fox Valley General Contractors Association, the Chicago Water Belt Contractors Association.

Representing the union, the president, the recording secretary, the vice president, myself, and another agent signed the agreement.

Q. All right. Is this the same master agreement, a copy of which you gave to Mr. Richards?

A. It is, yes.

Mr. Murphy: Are you offering it?

Mr. Baum: Yes.

Mr. Murphy: No objection.

Mr. Baum: I would like to offer this document entitled "Plaintiff's Exhibit 1" in [17] evidence.

The Court: It may be admitted.

Any objection, counsel?

Mr. Murphy: No objection to Plaintiff's Exhibit 1.

The Court: All right. It is admitted.

(Whereupon, the document previously marked for identification as Plaintiff's Exhibit 1 was thereupon received in evidence.)

Mr. Baum: Will you mark this as Plaintiff's Exhibit 2.

(Whereupon, the document was marked for identification as Plaintiff's Exhibit 2.)

By Mr. Baum:

Q. Mr. Witness, I now show you a copy of a document which I have had marked as Plaintiff's Exhibit 2 for purposes of identification and I ask you to look at it and identify it, if you can.

A. (Witness examining document.)

Yes; this is a copy of the memorandum of agreement that Mr. Richards signed.

Q. Who are the parties to the agreement?

A. Mr. Richards signed for Flair Builders, Incorporated; William F. Martin, the business [18] representative and president of Local 150 signed; Glen Stone, who was the recording secretary at this time, he signed; and, my signature is on there.

Q. Did you see Mr. Richards sign the memorandum of agreement?

A. Yes, I did.

Q. And did he see you sign it?

A. Yes, he did.

Mr. Baum: (Handing document to Mr. Murphy for examination.)

Your Honor, I move that Plaintiff's Exhibit No. 2 be admitted into evidence.

The Court: It may be admitted.

(Whereupon, the document previously marked for identification as Plaintiff's Exhibit 2 was thereupon received in evidence.)

By Mr. Baum:

Q. Now, Mr. Meagher, subsequent to the signing of the memorandum of agreement, Plaintiff's Exhibit No. 2, did you have another occasion to go out to Flair Builders?

A. Yes, I did, about a week or ten days later.

Q. And can you tell us the circumstances surrounding that incident.

[19] A. I got a call from Rumsey that he wasn't being paid the correct amount of money and so I went out on the job and checked his check. He was being paid, oh, around $1.00, $1.25 less than the collective bargaining agreement called for.

So I went over to see Mr. Richards and told him that he was not—

Q. You had a conversation with Mr. Richards?

A. Yes, I did.

Q. Who was present at that conversation?

A. Mr. Richards and myself.

Q. And where was this?

A. On the job site, Sugar Grove.

Q. And can you tell us who said what to whom, if anything?

A. I told Mr. Richards that he wasn't properly paying this man; he wasn't paying him according to the collective bargaining agreement.

He told me that he was taking the money out because he

wanted to get the money back that he had advanced him for the initiation fees.

Q. What happened after that?

A. Well, after—

Q. What happened after that, if anything?

[20] A. Well, I told him there wasn't any provision made in the collective bargaining agreement for deducting money from a man's wages for initiation fees and that he should pay him the correct amount of money and get his money out of him some other way rather than taking it out of his wages.

Q. All right. Did you have another occasion to see Mr. Richards at Flair Builders?

A. Yes; I was out about a week later.

Q. And can you tell us the circumstances surrounding that occasion?

A. It was the same set of circumstances; he wasn't being properly paid.

Q. Did you have a conversation with Mr. Richards at that time?

A. Yes, I did.

Q. Who was present?

A. Mr. Richards and myself.

Q. And can you tell us what was said and to whom, if anything.

A. Well, it was substantially the same as the first time; he said that he was taking that money off because the man still owed him for that initiation fee and he was going to keep on taking it out until he got [21] his $175 back.

Q. Did you have another occasion to visit the site of Flair Builders?

A. I believe I was out the following week under the same set of circumstances, yes.

Q. Did you have a conversation with Mr. Richards then?

A. Yes. It was—it was the same conversation, the same as before.

Q. Who was present?

A. Mr. Richards and myself.

Q. And the content of the conversation was substantially the same?

A. Substantially the same, yes. The same as before.

Q. All right. Can you tell us if you had another occasion to go out to the site of Flair Builders?

A. Yes, I did. Mr. Rumsey—Rumsey quit.

Q. And when was this?

A. Well, it was after he worked there about three weeks—as I recall, about three weeks after Mr. Richards signed the agreement. He quit and I went out and checked with him and—

[22] Q. Checked with whom?

A. With Jerry Rumsey.

He said that Mr. Richards still owed him that money because he wasn't paying him properly.

So I went over to Mr. Richards and asked him about it and he told me that he took that money out because he owed him that for the initiation fee.

Well, I went back to Rumsey and we figured it out, how much he was short on his, on the two or three checks that he got, and, actually, he was shorted less than he actually owed Mr. Richards, $175, so I asked Jerry what he wanted to do about and he said, "Well, we might as well forget about the thing."

Q. All right. Now, subsequent to Mr. Rumsey quitting the job, did you have another occasion to visit the job site in 1964?

A. After he quit?

Q. Yes.

A. Yes.

Q. And when was this, if you recall?

A. Oh, I would say about a week after Rumsey quit; within a week after he quit.

Q. And what did you observe on the job site, if anything?

[23] A. That there was another operator doing the excavating work.

Q. And who was that operator, if you know?

A. His name was Gene Arnold.

Q. Can you tell us who Gene Arnold is, to your knowledge?

A. Gene Arnold is an owner-operator; he was a subcontracting—he was subcontracting the work from Flair Builders. He was a member of Local 150.

Q. How long did Mr. Arnold work at the site as a subcontractor, if you know?

A. I would say about two and a half years, or a little better.

Q. All right. Now, during that same period in 1964, subsequent to Mr. Rumsey's quitting the job, did you have another occasion to visit the job site?

A. I was out there several times that summer, yes.

Q. What was the nature of your contact with the job site?

A. I would be going by and I would go in and I would talk to the operator in there.

Q. Did you ever have occasion to contact anyone from Flair Builders?

[24] A. No.

Q. Why not?

A. Because the work was subcontracted to Gene Arnold, and he was a member of our Local; I had no beef then.

Q. All right. Now Mr. Meagher, during the year 1965 did you have occasion to go out to the Flair Builders site, if you know?

A. I stopped out on the job six, eight times that summer, I believe, yes.

Q. What was the nature of your contact with the construction site, if any?

A. I stopped and talked to Gene Arnold.

Q. And did you have any occasion during 1965 to have any contact, direct contact, with anyone from Flair Builders, Incorporated?

A. Not that I recall.

Q. Why not?

A. I had no complaints on them; I had no reason to contact them.

Q. Was Mr. Arnold working on the job during that period?

A. Mr. Arnold was excavating there, yes.

Q. Excavating?

[25] A. Yes, that is right.

Q. All right. Now, during the year 1966, did you have occasion to go out to the construction site at Flair Builders, Incorporated, if you know?

A. Yes; I visited the job site on several occasions; several occasions in 1966.

Q. What was your—well, what was the nature of your contact with the site during 1966, if you can recall?

A. It was the same as the year before; I stopped by occasionally there and talked with Arnold.

Q. And about how many times did you check the job site in 1966?

A. It could be six, eight times.

Q. And did you have any contact with anyone from Flair Builders during the year 1966?

A. Not that I recall.

Q. Why didn't you have any contact?

A. I had no complaints.

Q. You had no complaints?

A. Yes, that is right.

Q. Any other reas[illegible]

A. Well, the work was being subcontracted to Gene Arnold and my dealings were with him.

[26] Q. All right. Now, Mr. Meagher, do you have a working knowledge of the memorandum of agreement which has been introduced into evidence?

A. I do, yes.

Q. Can you tell us what a grandfather clause is?

A. It is an agreement—it is a clause that is put into an agreement so that when a new contractor—excuse me; when a new contract is negotiated, we don't have to go back and have all of these contractors—we have, I would say, thousands of them—sign the memorandum of agreement. We don't have to go back over and to get all of these agreements signed again, they will carry on from agreement to agreement, unles we are given notice that the contractor wants to terminate the agreement or we give the contractor notice that we want to terminate.

Q. To your knowledge, does this type of a clause appear in the memorandum of agreement which Flair Builders signed?

A. Yes, it does.

Q. I ask you to look at Plaintiff's Exhibit 2 and point out the number of the paragraph which you testified to as a grandfather clause.

[27] A. (Examining document.)

Paragraph 3.

Q. Now, Mr. Meagher, to your knowledge, is there any way that the memorandum of agreement can be terminated by either party?

A. Yes, it can be.

Q. How? How would that come about?

A. By giving notice. I forget the exact number of days there; it is either 30 days or 60 days prior to the expiration

of agreement. You give notice that you want to terminate it, then when the new agreement is consummated we would have to go back and negotiate another—have the contractor re-sign.

Q. Now, to your knowledge, did Flair Builders ever submit such a notice to your union?

A. No, sir.

Q. And, to your knowledge, did Local 150 ever submit a notice of termination to Flair Builders, Incorporated?

A. No, sir.

Mr. Baum: Would you mark this as 3.

(Whereupon, a small book was marked for identification as Plaintiff's Exhibit 3.)

[28] By Mr. Baum:

Q. I now show you a document which has been designated as Plaintiff's Exhibit 3 for purposes of examination, that is, for purposes of identification, and I ask you if you can identify it for us.

A. (Examining document.)

This is the agreement that went into effect covering Kane County, among other counties, June 1, 1966.

Q. And are the parties to that agreement the same as those who are party to Plaintiff's Exhibit 1?

A. Yes, sir.

Mr. Baum: Your Honor, I move that Plaintiff's Exhibit No. 3 be admitted into evidence.

The Court: It may be admitted.

Mr. Baum: Thank you.

(Whereupon, the exhibit previously marked for identification as Plaintiff's Exhibit 3 was thereupon received in evidence.)

By Mr. Baum:

Q. Now, Mr. Meagher, does the union have any procedure, to your knowledge, in regard to distribution [29] of new master agreements?

A. Yes.

Q. And what is that procedure, if you know?

A. A company or contractor that belongs to one of the associations is given a copy of the agreement by the association. The contractors that have signed memorandums to these various agreements, when the new agreement is consummated, drawn up, they are mailed a copy from the Chicago office.

Q. And is this the general business custom and practice of your union?

A. It is standard procedure, yes.

Q. Now, Mr. Meagher, calling your attention to the winter of 1966-1967, did you have any occasion to go out to Flair Builders' site?

A. Yes, I was out there two, three times, yes.

Q. And what did you observe on the site, if anything?

A. That things were dead. Nothing was moving. The weather was bad. Shut down for the winter, I guess.

Q. Did you have another occasion to go out to the site of Flair Builders?

A. In the winter?

Q. After the winter?

[30] A. In the spring of 1967?

Q. Yes.

A. Yes.

Q. Can you tell us what month in 1967, the spring of 1967, you went out there.

A. As I recall, it was along in May, I believe.

Q. And can you tell us the circumstances surrounding that incident.

A. I got a complaint that there was a non-union man operating a high lift out there.

Q. What did you do? What did you do when you received your complaint?

A. I went out to the job site. There was a high lift running and I went over and talked to the man.

Q. Did you have a conversation with him?

A. Yes, sir.

I asked him if he belonged to Operating Engineers, Local 150, and he said, "No."

I said, "Do you belong to any union?" He said, "No."

I said, "Well, if you are going to operate this type of equipment, we have an agreement with Flair Builders that you are going to have to join the union."

[31] So he said that he wasn't very interested in joining the union; he had never belonged to a union and he didn't care to join.

Q. What happened next, if anything?

A. Then I contacted Mr. Richards.

Q. That was the same day, was it?

A. The same day, yes.

Q. Did you have a conversation with Mr. Richards?

A. Yes.

Q. Who was present at that conversation?

A. Mr. Richards and myself.

Q. Can you tell us who said what to whom, if anything?

A. I told Mr. Richards that we had an agreement and that this man who was running the equipment didn't belong to the union, that he was going to have to join.

Mr. Richards said, "Well," he said, "that's going to be up to the man." He said, "I'm not going to tell him to join. If he joins, it is going to be up to him to do it."

So I said, "All right," I said, "I will be back here in a week or ten days," I said, "and he is [32] going to have to sign up."

Q. What happened next, if anything?

A. Well, I went back there in a week or so and there was another man on the equipment.

Q. A new man?

A. A different man, yes.

Q. A different operator?

A. Right.

Q. What happened when you went out onto the site then?

A. Well, I talked to him; the same conversation. I told him that if he was going to work as an operating engineer, he would have to join Local 150.

It was the same story with him. He didn't—he didn't seem too interested in joining; in fact, he said that he didn't believe in unions, he wasn't going to join the union.

So, I went over and talked to Mr. Richards. I told him the same thing that I told him about a week or two weeks before; that the man is going to have to join the union.

He was giving me the same story, that it was going to be up to the man and that if he wanted to join, it was up to him.

[33] Q. Do you recall, Mr. Meagher, whether you had any further occasion to contact Mr. Richards during the summer of 1967?

A. I was on the job on several occasions in 1967, yes.

Q. Did you contact him in any other way?

A. I called him, yes, on the phone.

Q. And did you talk to him each time you contacted him by phone or personally?

A. Yes.

Q. And was the substance of your conversations the same as the conversations that you have testified to that occurred earlier in 1967?

A. Yes; every time I would go out on the job it seemed that there was a different man on the equipment. In our

agreement, the man has to join the union after seven days and no later than ten. By the time I would get out there, somebody else would be on the equipment.

A. All right. Did you have occasion to have any contact with Mr. Richards in the fall of 1967, if you know?

A. Yes, I believe it was along in October or November, it was late in the fall, I went out and told [34] Mr. Richards that he was going to have to start living up to that agreement—

Q. Was this on the job site?

A. On the job site, yes.

Q. Did you have a conversation with him?

A. Yes.

Q. Who was present at that conversation?

A. Mr. Richards and myself.

Q. Can you tell us who said what to whom, if anything, at that time.

A. Well, I told him that we are going to have to stop playing games; he signed an agreement with us, we are going to have to—he is going to have to live up to that agreement and there were no two ways about it.

He told me that he wasn't ever going to live up to that agreement and he told me that the next time that I came out on the job site he was going to have me arrested. He told me that that was his property out there.

Q. Now, did you have occasion to visit the job site during the winter of 1967-1968?

A. I was out there on, oh, two, three times in the wintertime, yes.

[35] Q. What did you observe when you went out to the site in the winter of 1967?

A. That things were pretty dead out there; there wasn't anything moving.

Q. All right. When was the next time that you contacted Flair Builders, if you know?

A. In the spring of 1968.

Q. Can you recall the month in 1968.

A. As I recall, I think it was along in, oh, June, possibly June.

Q. May or June?

A. Yes.

Q. What happened, if anything, in May or June of 1968?

A. Well, I went out on the job. I was called out there. There was a non-union operator running a piece of equipment out there.

I went out on the job and went over and talked to the man on the equipment.

Q. Do you remember his name?

A. His name was Floyd Schimmelpfennig.

Q. Did you have a conversation with Mr. Schimmelpfennig?

A. I did.

[36] Q. What did you say to him and what did he say to you, if anything?

A. Well, I introduced myself as the business agent of the Operators and told him that we had an agreement with Flair Builders to employ operating engineers and asked him if he wanted to join the union.

He said he had no objection; that he didn't have anything against unions, he was willing to join.

Q. What happened then, if anything?

A. Well, I told him what the wages were, and, during the course of the conversation, I told him what the wages were, what the initiation fee was, what he would derive, what benefits he would derive if he belonged to the union.

He told me that he was a little short of money right at the time, but that he was willing to sign the papers, sign the necessary papers, and, as soon as he got the money, he would join the union.

I told him that that was all right with me. So we got the papers signed.

I had to wait a little while for the money, for him to scrape it together, but he eventually joined the union.

[37] Q. Do you recall how much later after your first conversation that it was, your first conversation with Mr. Schimmelpfennig, how much later it was that he joined the union?

A. As I recall, I think that it was in July, around the middle of July when we signed him—when he paid the initiation fee.

Q. What happened then, if anything?

A. I went over and told Mr. Richards that Floyd belonged to the union—

Q. You went to the job site?

A. On the job site in Sugar Grove, yes.

Q. And you had a conversation with Mr. Richards?

A. Yes.

Q. Who was present at that conversation?

A. Mr. Richards and myself.

Q. Anyone else?

A. Not that I recall.

Q. All right. Can you tell us who said what to whom, if anything.

A. Well, I told Mr. Richards that Floyd now belonged to the union and he was going to have to pay him the wages, he was going to have to pay the health and welfare on him, and everything else that the union [38] agreement called for.

Mr. Richards said that he wasn't going to pay him the wages, that he didn't believe in the union, he just wasn't going to pay the wages.

Q. And what happened next, if anything?

A. Well, I went back and I told Floyd, I said, "This fellow says that he is not going to pay the wages," I said,

"but he signed an agreement with us," I said, "and he is going to pay them."

So I told Floyd to keep track of his time, keep his check stubs and I said that we would see that he got his money.

Q. What happened next, if anything?

A. Then I left the job site.

Q. Now, during the summer of 1968, do you recall anything that happened?

A. Well, I went out there the next week and the other agent from Elgin was with me, Bill Anderson, and we went out and we had another talk with Mr. Richards, because Floyd wasn't—the next time that he got his check, he wasn't getting his money yet, and so we went out and had another talk with him. It was the same story; he wasn't going to pay him the money.

[39] Q. Now, what happened next, if anything?

A. Well, it was more of the same thing. We went out there three or four times that summer and every time he wasn't going to pay the money.

Floyd got disgusted, he was going to quit.

I told him, "No, you stay there," I said, "this guy signed an agreement with us," I said, "you are going to get your money."

So it went on into August and we went out on the job, I went out on the job, and we got into quite a hassle there with Mr. Richards over this thing; in fact, he threatened to shoot me if I didn't get off the job.

Floyd, he was ready to quit. I said, "No, you stay there," I said, "we are going to get your money. We are going to get your money out of this fellow. He signed an agreement. You stay there with him."

Well, Floyd stayed.

Q. How many times did you say that that had happened during the summer of 1968?

A. That I visited the job site?

Q. Yes.

A. Oh, I don't know; eight times, ten times, at least.

[40] Q. All right. Calling your attention to the fall of 1968, do you recall anything that happened at that time?

A. Yes. We, as I recall, I believe it was in September, I told Floyd that—in fact, all summer I told Floyd to keep insisting that he got the—kept telling him that he insist that he get the correct amount of money, keep track of his money, keep track of his time.

In fact, we finally, during the summer we filed a Wage and Hours suit, a Wage and Hours violation complaint, against Flair Builders. It was substantially—eventually it was upheld. At the time Floyd was getting paid $4.00 an hour and when the suit was filed, or prior to when this suit was filed—

Q. Who filed the suit?

A. Who signed the complaint?

Q. Yes.

A. The union and Mr. Schimmelpfennig.

Q. And the complaint was lodged with whom?

A. With the Wage and Hours Division.

Q. Of the Labor Department?

A. Right. Floyd was being paid $4.00 an hour [41] and prior to this suit, when this was coming up, Flair Builders cut his wages back to $3.25 an hour, so they paid him time and a half on the $3.25 an hour.

Well, anyway, the Wage and Hours suit was substantiated; Floyd got back wages on the thing, as well as other people working on the job because they were all working for straight time, no overtime, and so—well, then Floyd—Flair Builders fired Floyd in September, as I recall, and then we filed an unfair labor charge against Flair Builders, which was substantiated.

Q. Who filed an unfair labor practices charge?

A. The union; Local 150.

Q. What was the outcome of that case, if you recall?

A. Flair Builders was found guilty—

Mr. Murphy: Your Honor, I am going to have to object to this.

I think that if they want to put into the record the outcome of the proceedings—

The Court: Well, I think that the record of the case is the best evidence as to what occurred. I would agree, yes.

[42] By Mr. Baum:

Q. Mr. Meagher, do you recall whether Mr. Schimmelpfennig received a sum of money as a result of the unfair labor practices case?

A. Yes, he did. He was offered reinstatement, that was one of the stipulations, that he would be offered reinstatement to his job.

Q. What happened next if anything?

A. (No response.)

Q. What happened next, if anything, during the fall of 1968, do you recall?

A. We started this proceeding.

The Court: How many subsequent master agreements have there been since this first one?

Mr. Baum: The second one, Plaintiff's Exhibit No. 3, is still in effect.

The Court: Just one?

Mr. Baum: There are two; the first one, I believe, expired May 31, 1966, and the next one expires May 31, 1970. This is the one—

The Court: So there has only been one in addition—

[43] Mr. Baum: That is correct.

The Court: But you claim that this is still in effect?

You don't adopt them each year, is that right?

The Witness: No, we try to get a three-year agreement, as a rule.

The Court: All right. Thank you.
Any further questions?
Mr. Baum: No further questions.
The Court: Cross-examine.

Cross-Examination by Mr. Murphy.

Q. Mr. Meagher, I understand you to say that these copies of the master agreements would have been sent to Flair Builders because that's the practice of your home office in Chicago, isn't that right?

A. That's the standard procedure, yes.

Q. You have no personal knowledge of whether any of these were ever sent to Flair Builders, do you?

A. Did I see it mailed? No, sir, I didn't see it mailed.

Q. So you have no personal knowledge of any of [44] these—you have no personal knowledge of any of them being mailed, is that correct?

A. That is correct.

Q. All right. Now, there is no question, is there, but what in between the few weeks after Jerry Rumsey was fired—or did he get fired?—until he left the job—

A. He quit.

Q. He quit?

A. He quit.

Q. And that was three weeks after you first got this memorandum of agreement in May of 1964?

A. As I recall it, it was approximately three or four weeks, right. It was right in that area.

Q. Could it have been two weeks?

A. It could have been.

Q. It could have been two weeks?

A. It is possible.

Q. And, from that time, with the exception of a couple of calls that you made within the succeeding week regard-

ing Rumsey's rate of pay, after he had already left, you had no contact with Flair Builders until, at the very earliest, 1967, isn't that correct?

A. That is correct.

[45] Q. And that was in the summer of 1967?

A. When I first had contact with Flair Builders again?

Q. Yes.

A. No; it was in the spring of 1967.

Q. In the spring of 1967?

A. Yes.

Q. Now, I believe that you told us that in the spring of 1967, you went to the job site again?

A. Yes, sir.

Q. And at this time the job site of Flair Builders was where, on the west side of Route 47?

A. I don't recall.

Q. Well, let me refresh your recollection. The first job site that you went to during May of 1964 was on the east side of Route 47 in the Village of Sugar Grove.

A. Right.

Q. Was it not?

A. Right.

Q. And in the spring or summer of 1967, when you finally got back there again, they were now on the west side of Route 47?

A. It could well be, yes.

[46] Q. Well, let's try to recollect. Try to recollect, would you, please, Mr. Meagher.

You are very familiar with their job sites?

A. Yes. I believe that it was. I think that they were working over on the west side again.

Q. All right. It is a different subdivision, isn't it?

A. A different subdivision?

Q. A different subdivision from the one that they were on in May of 1964?

A. I don't know if it was a different subdivision, it was on a different side of the road.

Q. All right. Now, have you ever been on any job sites of Flair Builders which are outside of Sugar Grove or the direct Sugar Grove area?

A. I never have been on one of the job sites, no.

Q. Do you know if they have ever had any job sites outside of Sugar Grove?

A. I believe that they built two or three houses down by Bristol or Yorkville, down in that area.

Q. All right. Now, do you know when that was?

A. I don't recall, no.

[47] Q. You never went on a job site down there, did you?

A. At that time I didn't have jurisdiction over Kendall County. I was still in Kane County.

Q. Just Kane and not Kendall?

A. I had Kane and DuPage County, yes.

Q. All right.

A. I got Kendall County here about a year ago, about a year ago, to take care of.

Q. All right, sir.

Now, what if a contractor that is generally in your jurisdiction in Kane County works in Kendall County, is he still your contractor?

A. I don't own any contractors, sir.

Q. Well, I mean, is he still subject to your supervision as far as the union is concerned?

A. No, no; the agent in the area where he is working takes care of it.

Q. Now, you have also testified here to two conversations with employees of Flair Builders; one was a second man that I believe that you saw working some heavy equipment in 1967. You didn't know his name, did you?

A. No, I did not.

[48] Q. You saw a man first and then the following week you went out and a different man was running the equipment, am I correct?

A. That's correct.

Q. And that's the spring of 1967?

A. That is correct.

Q. And again in the spring of 1968 you went out and saw Floyd Schimmelpfennig running equipment?

A. Yes.

Q. All right. Now, on both of those occasions, you have testified here that your conversation with a man was to the effect that you had a contract with Flair Builders, you told both of them that?

A. As I recall, I did, yes.

Q. Now, I want to call your attention, Mr. Meagher, to a deposition which was taken of you on October 3rd, 1969, at 105 South LaSalle Street, Chicago. Do you remember that?

A. I remember the deposition.

Q. Do you remember that you were sworn, that you were under oath and that you were asked certain question?

A. Right.

Mr. Murphy: Page 28.

[49] By Mr. Murphy:

Q. Was this question asked you, Mr. Meagher, and did you make this answer:

"Question: And on this day in the spring of 1967 you saw a man operating a front end loader and you talked to him, am I correct?

"Answer: Yes.

"Question: And do you know his name?

"Answer: No.

"Question: What was your conversation with this man?

"Answer: I asked him if he belonged to the union, Local 150, and he said, 'No.'

"Question: What did he say?

"Answer: I said, 'Do you belong to any union?' and he said, 'No.' I said, 'Doing this type of work, you are supposed to belong to Local 150, the Operating Engineers,' and he said, 'No.' he wasn't too interested in belonging to the union.

"Question: All right. Anything else?

"Answer: I believe that that is about the extent of the conversation."

Were those question asked of you and did you make those answers?

[50] A. It is very—as I recall, I did, yes. If it is on there, I must have.

Q. There was no mention there of any agreement with Flair Builders, was there?

A. Evidently there wasn't.

Q. Now, I refer you to a portion later on in the same deposition and I ask you if these questions were asked of you and if you made these answers—

Mr. Murphy: Page 39.

By Mr. Murphy:

Q. (Reading:)

"Question: Did you talk to Floyd Schimmelpfennig?

"Answer: Yes.

"Question: And what was your conversation with him?

"Answer: I told him that operating that type of equipment came under the occupational jurisdiction of

the Operating Engineers and that he should come in and belong to the Operating Engineers.

"Question: What did he say?

"Answer: He said that he didn't have any objection to joining the union.

[51] "Question: He was not yet a member?

"Answer: No.

"Question: At that time that you first talked to him?

"Answer: No.

"Question: So what did you do?

"Answer: Well, I told him that he would have to get signed up. I told him what the initiation fee was and I told him that he was supposed to join the union within seven days and no later than ten.

"Question: Did he join?

"Answer: Yes.

"Question: At that same conversation?

"Answer: No, subsequently to that."

Were those questions asked and did you make those answers?

A. As I recall, I did, yes.

Q. And there was no mention of any agreement with Flair Builders at that time either?

Mr. Shulman: Object.

The Court: Objection sustained.

You are going to have to decide who is going to do this over at that table.

[52] Mr. Shulman: All right.

The Court: One or the other of you; I mean, you will have to—who is conducting this?

Mr. Shulman: Mr. Baum will conduct the direct portion of the case. We have not decided who is going to do the cross yet, but he will conduct the direct.

The Court: Well, let's—I don't think that this is going to prove one thing or the other; I mean, if he were out there, wouldn't he be out there on the basis that there was some kind of an agreement, that some kind of an agreement existed, or was he just trying to sign someone up, is that your theory?

Mr. Murphy: That's what it appeared to be at the time, your Honor.

The Court: Well, I mean, I haven't heard your defense yet, but, apparently, your man signed the agreement, an agreement—what is the defense, so far as you are concerned?

Mr. Murphy: The defense, to sum it up [53] as briefly as I can, at this point, is twofold: Firstly, that the agreement was effectively abandoned by the union long before the date that they began to do anything with regard to it; certainly long before the new master agreement with the general contractors association came into effect.

The Court: How do you abandon an agreement?

Mr. Murphy: I think that they abandoned it by doing nothing in the way of enforcing it—

The Court: Enforcing it?

Mr. Murphy: Enforcing it or nothing in the way of acting as if it existed and treating it as if it did not exist.

The Court: Well, I just want to get your—just so I understand what the purpose of these questions is, I just want to get that.

All right. Anything further with this witness?

Mr. Murphy: One thing further—and, [54] your Honor, the balance of it is basically on the question of the signing.

The Court: All right.

Mr. Murphy: Which we will refer to again in the defense.

The Court: Yes. All right. Go ahead.

By Mr. Murphy:

Q. Now, on May 12, 1964,—and this was the date that Mr. Richards signed this memorandum of agreement, right?

A. As I recall, it was, yes.

Q. All right. Is there any question in your mind, sir, that he paid to you the dues and initiation fee for Mr. Rumsey?

A. He gave me a check for Mr. Rumsey's initiation fee, yes, sir.

Q. And you requested that Rumsey should become a member, did you not?

A. Well, I——

Q. In fact, you talked to Mr. Rumsey first?

A. I talked to Rumsey and asked him if he had any objections to joining the union, that is correct, yes.

Q. All right. Now, there was no election of [55] employees of Flair Builders, was there?

A. Election? There was only one man working for him; only one man operating.

Q. All right. That's the point; there was only one employee that you could possibly have considered subject to your union jurisdiction, wasn't there?

A. That is correct.

Q. All right. And did you suggest to Mr. Richards that he should pay the union dues because Mr. Rumsey couldn't afford them or did not have the money?

A. Did I suggest it to him?

Q. Yes, sir.

A. Mr. Richards volunteered to pay his initiation fee.

Q. All right. Did you suggest to Mr. Richards that if he did not sign Mr. Rumsey into the union that you would pull the Davis employees off of the job?

A. No, sir.

Q. Have you ever suggested that to Mr. Richards?

A. No, sir.

Q. Did Mr. Davis—who was present at the time, wasn't he? —did he suggest that in your presence?

[56] A. No, sir.

Q. You did mention that these people of Davis were union employees, didn't you?

A. That is correct.

Q. You did mention that they did not want to work with people who were not union employees, didn't you?

A. Did I mention that?

Q. Yes.

A. I don't recall mentioning that.

Q. Well, I am asking you, sir.

A. As a rule, a union man does not like to work alongside of a non-union man, that is correct.

Q. And this suggestion was made in your conversation, was it not?

A. Not that I recall.

Q. Well, let me ask you, sir, whether you permitted your union employees to work a job alongside of non-union employees?

A. Do we permit them to?

Q. Yes.

Mr. Baum: Objection, your Honor.

The Court: Objection sustained.

Mr. Murphy: Nothing further.

[57] The Court: All right. Nothing further—anything further with this witness.

Mr. Baum: I have no further questions of this witness.

The Court: All right. That will be all. You are excused.

(Witness excused.)

The Court: Your next witness.

Mr. Baum: I call to the stand Mr. William Anderson.

(Whereupon, the witness was duly sworn.)

WILLIAM ANDERSON, called as a witness by the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Baum.

Q. Would you state your full name, please.

A. William N. Anderson, A-n-d-e-r-s-o-n.

Q. Where do you reside?

A. 250 Hoxie Avenue, Elgin, Illinois.

Q. What is your occupation?

A. Business representative, Local 150.

Q. Is that the Local 150 who is the plaintiff in this case?

[58] A. Yes.

Q. How long have you so been a business representative?

A. Approximately five years.

Q. What office do you operate out of?

A. Suite 302, Tower Building, Elgin, Illinois.

Q. Is that the same office that Mr. Meagher operates out of?

A. Yes.

Q. Now, can you tell us what your duties are as a business representative?

A. Oh, organizing the unorganized, policing jobs in regard to complaints, wages, health and welfare.

Q. Are you familiar with Flair Builders, Incorporated, the defendant in this case?

A. Yes.

Q. Can you tell us who Flair Builders is, if you know?

A. It is a home development; build homes in Sugar Grove, Illinois.

Q. Have you ever had occasion to have any contact with Flair Builders, Incorporated?

A. Yes.

Q. Can you recall when that was?

[59] A. Approximately late July, 1968.

Q. And could you tell us the circumstances surrounding this incident.

A. I visited the job site with Mr. Meagher.

Q. Why did you go out to the job site, if you recall?

A. I was with him that day and he had a complaint there.

Q. What happened when you went out to the job site?

A. He introduced me to Mr. Richards.

Q. Who is Mr. Richards?

The Court: Well, we know who he is.

Go ahead with your questions.

By Mr. Baum:

Q. Was there a conversation at that time?

A. Yes.

Q. Who was present at that conversation?

A. Myself, Mr. Meagher, Mr. Richards.

Q. Can you tell us what was said to whom, if anything?

A. Mr. Meagher said to him that he felt that he was in violation of the contract in effect; that he was not paying the wages or working conditions and so forth.

[60] Mr. Richards said to him that he didn't like that agreement and he had no intention of living up to it.

Q. Mr. Anderson, did you have any other occasion to have further contact with Flair Builders, Incorporated?

A. No.

Mr. Baum: I have no further questions.

The Court: Any questions?

Mr. Murphy: Yes, your Honor.

The Court: All right. You may inquire.

Cross-Examination by Mr. Murphy.

Q. Sir, I have only one question: This was the summer of 1968?

The Court: July, 1968, he said.

By the Witness:

A. July 1968.

By Mr. Murphy:

Q. Is that correct?

A. Yes.

Q. Did you have any employees who were members of the union on the Richards or Flair job site?

A. I don't know—that was the only contact that I had. We got out of the car; I was introduced, the [61] conversation was had and we left.

The Court: All right. Let's go on.

Is that all?

Mr. Murphy: Yes, your Honor.

The Court: All right. Does that complete your case?

Mr. Baum: Yes, your Honor.

The Court: All right. You are excused.

(Witness excused.)

The Court: All right. I will hear from the defense.

Mr. Griffin: I will get the witness, your Honor.

The Court: All right. You can have the witness sworn.

(Brief interruption.)

Mr. Griffin: Take the stand please.

Mr. Baum: Your Honor, before we proceed, I would ask leave to file—

The Court: Copies?

Mr. Baum: Copies, two exhibits, I believe. Plaintiff's Exhibits 1 and 3.

The Court: All right. You may.

Mr. Baum: Thank you.

[62] (Whereupon, the witness was duly sworn.)

THOMAS STANLEY RICHARDS, called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Murphy.

Q. Will you state your name, please.
A. Thomas Stanley Richards.
Q. Where do you live, Mr. Richards?
A. Sugar Grove.
Q. Are you related to Robert V. Richards?
A. Yes.
Q. Is he the president of Flair Builders, Incorporated?
A. Yes.
Q. What relationship to him are you?
A. I am his brother.
Q. Are you employed by Flair Builders, Incorporated?
A. Yes.
Q. In what capacity?
A. Foreman.
Q. In that capacity, do you direct the hourly wage employees?
[63] A. Yes, sir.
Q. How many are there?
A. There are five of them.
Q. And is that true now, at the present time?
A. Yes.
Q. At the present time?
A. Yes, that is right.
Q. When did you start in your employment for Flair Builders?
A. August of 1966.
Q. Have you been continuously employed as a foreman all during that time?
A. Yes.

Q. Mr. Richards, have you ever seen any business agents of Local 150 Operating Engineers Union on the job sites of Flair Builders?

A. Yes.

Q. When was the first time that you saw one?

A. This spring.

Q. Are you referring to 1969?

A. Yes.

Q. What was the occasion of that?

A. Several of them, several union members came out there, parked in the road.

[64] Q. You mean other types of unions?

A. Yes, sir.

Q. And one of the union men was an Operator's man, is that correct?

A. Yes.

Q. Is that correct?

A. Yes, that is right.

Q. And what was the occasion of their visit?

A. They stood around for a while and got into their cars and left.

Q. Was one of those men Mr. Meagher, the representative of Local 150 who is sitting here?

A. I am not sure; I believe so. There was an Operator's union man there, yes.

Q. All right. Now, prior to that had you ever seen him?

A. No.

Q. Or any other representative of Local 150?

A. No.

Q. Did you ever see any other representative of Local 150 of the Operating Engineers on your job sites at any other time?

A. One other time, yes.

Q. Was that after the first time that you have just described?

[65] A. Yes.

Q. So it would have been still in the spring of 1969?

A. Yes.

Q. And what was the occasion of that visit?

A. He came out with the State Safety man.

Q. Do you know the name of that State Safety man?

A. Mr. Stevens.

Q. And what department of the State is he with?

A. State Safety Department.

Q. All right. What was the purpose of that visit? What was the purpose, if you know?

A. We had a ditch there that they said was hazardous; that we couldn't have an open ditch over four feet deep.

Q. Was this ditch over four feet deep?

A. No.

Q. What did the State Safety man say to you—and, by the way, was Mr. Meagher present at this conversation?

A. At that time, yes.

Q. All right. What was said at that time?

A. That we couldn't have an open ditch that deep.

[66] I measured the ditch and it was four feet deep.

Q. Now, on either of these occasions was there any mention ever made to you of the existence of a contract between Local 150 and Flair Builders, Incorporated?

A. No.

Mr. Murphy: I have no other questions.

Cross-Examination by Mr. Shulman.

Q. Now, you are Mr. Richards also, is that correct?

A. Right.

Q. And your first name is—

A. Thomas Stanley Richards.

Q. Thomas?

A. Right.

Q. Now, Thomas, you were not employed where this contract—

The Court: Well, he told us that he didn't start working there until 1966, so we don't have to ask him that.

You weren't—.

Mr. Shulman: Well, it is in the line of [67] questioning—

The Court: You weren't employed there, were you, before 1966?

The Witness: No, sir.

By Mr. Shulman:

Q. Now, you say that you were not present when the initial contract was signed?

A. No.

The Court: No, of course, he was not.

By Mr. Shulman:

Q. Now, in this connection what type of duties do you do on the job?

A. I supervise the men, plus the fact that I work on my own.

Q. You do work on your own?

A. Yes.

Q. What do you do on your own?

A. I might drive a crawler, I might drive a truck, I might get in a ditch with a shovel.

Q. I see. So the times that you are getting into the ditch—

The Court: Well, I would assume that he wasn't there constantly on the job, if this is what you are trying to prove. [68] I will assume it, if this is what you are trying to prove.

Mr. Shulman: All right. Thank you. We will get off that now.

The Court: Yes.

By Mr. Shulman:

Q. Now, did you see your brother on the job?

A. Do I see my brother on the job?

Q. Did you, during 1966 and 1967?

A. Sometimes, yes.

Q. And sometimes you don't see him on the job?

A. Right.

Q. Is there an office located there?

A. In his residence at that time.

Q. Pardon me?

A. In his residence at that time.

Q. And the time that the business agent that you did see him on the job, at that time, did you—at the time that you did see him on he job, was that at his residence?

A. No, sir.

Q. I mean, that was out in the field.

A. On the job.

Q. Now, is it possible that he might have [69] gone, that the business agent might have gone to his residence and you would not have been in attendance?

A. It could have been.

Mr. Shulman: That is all.

The Court: All right. That will be all. Step down.

(Witness excused.)

The Court: Call your next witness.

(Witness sworn.)

ROBERT V. RICHARDS, called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Murphy.

Q. Will you state your full name, please.

A. Robert V. Richards.

Q. Where do you live, Mr. Richards?

A. 52 Nero Road, Sugar Grove, Illinois.

Q. Are you the president of Flair Builders, Incorporated?

A. Yes, sir.

Q. Have you been president since it was incorporated?

A. Yes, sir.

[70] Q. And when was that?

A. 1963.

Q. Mr. Richards, on May 12 of 1964, you had occasion to have a conversation with Mr. Meagher, who is present in the courtroom, did you not?

A. Yes, sir.

Q. Who was present on that date?

Who was present on that date when you had a conversation with him?

A. Zane Davis, Davis Construction Company from Plano, Illinois.

Q. And yourself?

A. And myself. Yes.

Q. And Mr. Meagher?

A. Mr. Meagher, that is right.

Q. All right. Now, I want you to tell the Court exactly what each of you said in that conversation, as closely as you can recall.

A. Mr. Meagher, Mr. Davis, they came in to me; Mr.

Davis was putting in some sewer lines, streets, working there in the spring of the year.

Mr. Meagher says, "Well, you have got a man which is operating a machine who is not union." He says, "You have a union contractor who is putting [71] in your streets."

They left me with the impression, either I buy a card—

The Court: Not with an impression that they left you with—

The Witness: All right.

The Court: —but what they said.

By Mr. Murphy:

Q. State what they said, Mr. Richards.

The Court: What did they say?

The Witness: They said—

The Court: Who said what?

The Witness: Mr. Meagher said I will have to buy a card for this man operating the machine.

The Court: That who would?

The Witness: Flair Builders.

The Court: All right.

By Mr. Murphy:

Q. And the man that they were referring to was Mr. Rumsey, is that correct?

A. Rumsey is the man who was running the machine.

Q. All right.

A. Mr. Davis says, "Well, if you don't buy a card, I will have to pull my men off."

[72] So I am trying to get the work done; he comes to me, he says, "The card will cost $175." He says, "You sign"—

Mr. Shulman: Objection unless he can establish—

The Court: Well, let's find out who said what.

By Mr. Murphy:

Q. Who said this?

A. The business agent from Local 150, Mr. Meagher. He said—

The Court: He said what to you?

The Witness: "The card will cost $175. You sign this agreement and we will issue a card; Davis can go ahead and work and everything will be fine."

I signed an agreement, give him a check for $175. Everybody went ahead and worked and I thought that everybody was happy.

By Mr. Murphy:

Q. Now, Mr. Richards, was anything said to you about paying a wage scale other than to Mr. Rumsey?

A. No, sir.

Q. Was anything said to you about using—

[73] Mr. Shulman: I will object to this, unless he has exhausted his recollection.

We have got a conversation here—

The Court: Well, you will have to rise to make your objections, too.

Mr. Shulman: I am sorry, your Honor.

Mr. Baum: We will object unless he exhausts his recollection. We have got a direct question. I want to know what was said. I would like to find out what the witness testified to—

The Court: Well, I think that that is the way to ask the question.

What was said? I think that you are right.

By Mr. Murphy:

Q. Was anything else said, to your recollection, sir, at that conversation?

A. No.

Q. Or have you described the entire conversation?

A. Well, just—well, there was more words, undoubtedly, but this was the main principle, as to my recollection of the conversation.

Q. All right, sir.

[74] Q. Now, Mr. Richards—

The Court: Was he the only employee of that type that you had at that time? Mr. Rumsey?

The Witness: He was not an operator, he was a laborer. We had a piece of equipment that cost $500 that was w[illegible]out that once in a while we had to use. He was—

The Court: Well, he was acting as an operator, an operating engineer?

The Witness: He was operating as a—in an operator's capacity at this time, therefore, in order to keep Mr. Davis on the job and to keep this job going, I bought a card.

The Court: So you bought a card and joined the union, didn't you?

The Witness: I signed a piece of paper.

The Court: You signed a piece of paper?

The Witness: Right.

The Court: Did you get a copy of an agreement?

The Witness: Later a copy was mailed to me.

[75] The Court: All right. Go ahead, counsel.

Mr. Murphy: All right.

Q. Now, how long after May 12 did Mr. Rumsey stay in your employment?

A. Approximately two weeks.

Q. All right. During that two weeks did you have any conversations or any contact from Mr. Meagher or anyone else from Local 150?

A. No, sir.

Q. And two weeks later Mr. Rumsey left your employment?

A. Yes, sir.

Q. Do you know where he went?

A. Yes, sir.

Q. Where did he go?

A. Materials Service, Joliet.

Q. Did you receive a call immediately after Mr. Rumsey left from Mr. Meagher?

A. No, sir.

Q. Did Mr. Meagher ever suggest to you that you owed Mr. Rumsey some back pay or some money?

Mr. Baum: Objection.

[76] Mr. Murphy: Well, I am entited to inquire.

The Court: Objection sustained.

You may ask him whether or not on some occasion that he testified to, whether Meagher came out and discussed with you the fact that you were deducting money from Mr. Rumsey's check and objected to it—is that right?

The Witness: Meagher didn't come out and talk to me at any time after I paid the dues, until Rumsey left.

The Court: He never came out?

The Witness: No, sir.

The Court: He never came out at all?

The Witness: No, sir.

The Court: All right.

By Mr. Murphy:

Q. Did he ever come out within the period after Rumsey left for the balance of 1964?

A. No, sir.

Q. Did he ever call you?

A. No, sir.

Q. Did he ever call you during 1964?

A. No, sir.

[77] Q. Did you have any contact with him or with the union whatsoever during the balance of 1964?

A. No, sir.

Q. You did get from the union the copy of the contract you had signed, is that correct?

A. Yes.

Q. And that's the only other contact?

A. Yes, sir.

Q. All right, sir. Now, in 1965—well, starting after Mr. Rumsey left, did you keep the piece of equipment that Mr. Rumsey had been working on?

A. Yes, sir.

Q. What kind of equipment was that?

A. It was an HD-5 Allis-Chalmers crawler with an end loader.

Q. All right. Did you continue to use it?

A. Yes, sir.

Q. Did any employees of yours drive it or operate it?

A. Yes, sir.

Q. What kind of employees would operate it?

A. I would consider them laborers, myself.

Q. In other words they are jacks-of-all-trades?

A. They could operate it or they could dig me a [78] ditch or what we needed done. If we wanted lumber moved, why, they would move the lumber, or—

Mr. Baum: Objection.

Mr. Shulman: Object; I ask that the answer be stricken. There is no question pending before the witness.

The Court: Well, let's—we don't need to go into any more detail.

By Mr. Murphy:

Q. Did you also retain a subcontractor to dig your basements?

A. Yes, sir.

Q. And who was that?

A. Gene Arnold.

Q. When did you first hire him as a subcontractor?

A. It would have been the early part of the summer of 1964.

Q. All right. Now, during 1964, did you acquire any additional heavy equipment?

A. No, sir.

Q. During 1965 did you still have the crawler that you had in 1964?

A. Yes, sir.

Q. Did you continue to use it and have it [79] operated by your employees?

A. Yes, sir.

Q. Did you acquire any additional—did you acquire any additional equipment?

A. One rubber-tired Ford backhoe.

Q. All right. And did you have that operated by your employees during the year of 1965?

A. Yes, sir.

Mr. Shulman: Object to the leading form of the question.

The Court: Overruled.

By Mr. Murphy:

Q. What is your answer?

A. Yes, sir.

Q. Did you continue to use the subcontractor to dig your basements?

A. Yes, sir.

Q. Now, in September of 1966 where were you doing your work at that time, your corporation?

A. In September of 1966, we were working in the Yorkville area on an area called Cutoff Road.

Q. All right. How long did you continue in that area?

A. We continued in that area until June of 1967.

[80] Q. During that period, were you working in the Sugar Grove area?

A. We started working in the Sugar Grove area in the latter part of May of 1967.

Q. And not before that, since September of 1966? Do I intepret you rightly?

A. That is right.

Q. All right. Now, when you returned to the Sugar Grove area to do your work in 1967, did you still have the two pieces of equipment that we have just deschribed?

A. In 1967, we had three pieces of equipment.

Q. When did you add the third?

A. In the fall of 1966.

Q. And what was that equipment?

A. That was a Case 1150 crawler with an end loader.

Q. Was that operated by your employees?

A. Yes, sir.

Q. Did you add any equipment during the year 1967?

A. We bought one more Case 1150.

Q. Now, when you were in the Sugar Grove area, up through 1967, on those occasions that you were working [81] in the Sugar Grove area, where were your working?

A. Working on the east side of Highway 47.

Q. Do you have any name for that area, a subdivision name?

A. Tollway Subdivision.

Q. Tollway?

A. Tollway Subdivision. Yes.

Q. All right. Now, when did you ever begin to work on the west side of Route 47?

A. We moved on the west side of Route 47 in the latter part of May, 1968.

Q. And not until 1968?

A. No, sir.

Q. Now, did you have any contact from Local 150 of the union of Operating Engineers during the year 1965?

A. No, sir.

Q. Did you have any contact during 1966?

A. No, sir.

Q. Did you receive any request from them that you should use the—

The Court: Well, counsel, on the question of abandonment, as I indicated already very clearly in the opinion I rendered, if [82] the agreement came into existence, the question as to whether it was abandoned is for the arbitrator, not for me.

Mr. Shulman: That is right.

The Court: (Continuing.) If there was an agreement to begin with.

Mr. Shulman: That is right. I think that—

The Court: You don't have to join me; I mean, I am deciding the thing on the basis of—I pointed it out very clearly, that if the agreement was executed, if there was an agreement, the question of abandonment is for the arbitrator, along with the other issues in the case.

Mr. Shulman: Exactly. That's why I think that we are superfluous in terms of this proceeding because this is the defense.

Mr. Murphy: May I answer the Court?

The Court: Yes, you may.

Mr. Murphy: Your Honor, we interpreted your opinion, at least specifically the second one, to say that your Honor was having a hearing on the threshold question of whether [83] or not—

The Court: As to whether an agreement existed.

Mr. Murphy: Whether or not there was an existing contract.

The Court: No; as to whether or not any agreement was ever made.

Mr. Murphy: Well, there is no doubt, your Honor, that there was a piece of paper that was signed—

The Court: It was more than a piece of paper.

Mr. Murphy: At this time, in order to have arbitration, we have to have a binding contract in existence at this time. We can't arbitrate under a contract that has been cancelled.

The Court: The question for the arbitrator is whether the other, I mean, whether the initial agreement is still in existence.

He can decide whether it has been abandoned and hear the same evidence, and the evidence is for the arbitrator and not for me. [84] I mean, once the agreement is established, whether you like it or not, and whether I like it or not, I might say, I am bound by what the law provides, and that is that the initial agreement says that you submit it to arbitration; that's where it has to go.

Mr. Murphy: Well, your Honor, the very terms of the amended complaint that is brought by the union is contradictory of that to the extent that what they are saying is, they want us to arbitrate under a contract that they have got with the Fox Valley Manufacturers, or, rather, Home Builders Association, as it now exists, and the question must be determined as of now.

The Court: You talk to the arbitrator, or arbitrators, whoever they are, on the question of—

Mr. Murphy: But we can't arbitrate if we don't now have a contract, your Honor.

The Court: Well, I held this hearing to determine—I didn't know what the facts were with reference to whether or not your [85] client received a copy of a master agreement and whether some representations were made that the agreement would not be an agreement.

Apparently what he did was—he got himself involved

by making that first—joining that one man to avoid a present difficulty.

Mr. Murphy: That is correct, your Honor, but—

The Court: That's where the whole problem started.

Mr. Murphy: And nothing happened from then on; the union didn't plead it as a contract.

The Court: I think that you may have a very excellent case to present to an arbitrator on the basis that the union stood by one side, and, if I were the arbitrator, I would like to find out—do you have here—what is the name of the employee who was signed up to begin with? What was the name of the man who lasted about two weeks, three weeks?

Mr. Murphy: Mr. Rumsey.

[86] The Court: Is he here today?

Mr. Murphy: No, sir. We didn't—

The Court: Well—

Mr. Shulman: Well, if it please the Court—

The Court: Well, there is a difference of opinion, apparently, as to whether one single thing is done after he was signed up. Mr. Meagher said that he talked to him a couple of times; this witness denies it. Now, you have—but that isn't for me. That's for the arbitrator.

Mr. Murphy: Well, your Honor, our contention is that, using the phrase that your Honor's opinion used, the threshold question is whether there was—

The Court: Whether there was ever a contract.

Mr. Murphy: Not only whether there was ever a contract but whether there now is a contract.

What if we had cancelled the contract by notice? Then there is no contract. We couldn't be ordered to arbitrate that [87] because we don't have a contract in existence to be arbitrated under. This is the intendment of the cases that were cited by your Honor in his opinion; that the threshold question to be decided by the Court in a Section

301 proceeding is whether or not there is or is not a valid and subsisting contract that can be arbitrated under.

The Court: I said: "... Therefore, if the employer consented to the alleged collective bargaining agreement ..." —and that the abandonment issue, the laches issue and the abandonment issue should be decided by the arbitrator rather than by the Court.

Mr. Murphy: Well, I can agree with the laches.

The Court: This was to consider which issues, if any, the employer agreed to arbitrate—was that the first opinion or the second one?

Mr. Murphy: What is the date on that one, your Honor?

The Court: Let's see; August 26. That was the last one, wasn't it?

Mr. Murphy: That's the second one.

[88] I mean, this is, in a way, you know—laches is another thing. I can go along on this being an arbitrable question, I suppose, if you have got a contract, but we are talking about a matter which goes to the very present existence of a contract, and, under Section 301, the cases that your Honor cited—

The Court: The question is whether the agreement to arbitrate ever came into existence. I hold that it does.

Mr. Murphy: And that it subsists.

The Court: Well, where do you get the "subsists"?

Mr. Murphy: Well, this is the intendment of the cases that your Honor cited in his opinion.

If there isn't an agreement, then how can we be required to arbitrate under an agreement that does not exist?

The matters of procedure which ask whether or not the party proceeded correctly under the agreement, and that sort of thing, may well be arbitrable questions, but those aren't what we are talking about.

[89] What we are discussing here is the very existence—

The Court: Is it your contention—

Mr. Murphy: Pardon me?

The Court: Is it your contention that they have abandoned the contract? You abandoned the contract somehow?

Mr. Murphy: That is strictly our contention; yes, it is, that they treated it as never being in existence and that we are entitled to rely on that, so that there is no contract.

The Court: Well, go ahead, finish your examination so that the whole record is made.

Mr. Murphy: All right, your Honor.

By Mr. Murphy:

Q. All right, Mr. Richards. I believe that we were up to the year of 1966 and I was asking you whether you had any contact with or conversations with any representative of Local 150.

A. No, sir.

The Court: When was the first time after this man left, whatever his name was—

The Witness: Mr. Rumsey.

[90] The Court: Rumsey; when was the next time that anybody from the union came around to bother you?

The Witness: My personal contact with the business agent himself was in 1968.

The Court: I said, "anyone from the union."

The Witness: 1968.

The Court: What part of—

The Witness: That was Mr. Meagher.

The Court: What part of 1968?

The Witness: It would have been somewhere, I would say, in July; the middle of the summer.

The Court: What happened then?

The Witness: Mr. Meagher and the other—

The Court: The other gentleman?

The Witness: —the other gentleman sitting down there,

they came out and they says to me, "You are going to have to get these men in the union."

I had two men on a machine that day; one was running the John Deere scraper, one was running a 1150 crawler, Case.

[91] I says to them, "There's two men operating; go talk to them. If this is what they want, I will consider it."

They didn't even as much as go talk to those men. They got in their car and left.

Mr. Baum: I will object.

The Court: Well, what is the objection?

Mr. Baum: Well, "They didn't even as much as talk to those men."

How would he know? I object.

The Court: Well, they did not.

The Witness: They didn't; they didn't even go walk over there.

The Court: All right. Go ahead.

The Witness: They got in their car and left.

The Court: The objection is overruled.

When was your next contact?

Let's finish up. I have only got about five or ten more minutes left here. I can only give you five or ten minutes. Let's go on. Finish up.

[92] By Mr. Murphy:

Q. In July of 1969—

A. Approximately in July of 19—1968.

Q. In July of 1968?

A. Yes.

Q. All right. Where were you working at that time?

A. We were working in Ridge West Subdivision, which is on the west side of Sugar Grove.

Q. And subsequent to that time, how long was it before this action was filed? Do you recall?

A. No, I couldn't say.

The Court: Well, the record shows when it was filed.

The Witness: Yes. I couldn't say as to what date.

The Court: The record will show when it was filed. Go ahead.

Mr. Murphy: Yes.

The Court: It was filed in July of 1969—no, earlier than that.

Mr. Murphy: This was filed in 1968, your Honor.

The Court: 1968. All right.

[93] Let's finish up with this witness.

Mr. Murphy: All right, your Honor.

The Court: The record will show when the case was filed. Anything further?

Mr. Murphy: No, your Honor.

Your witness.

The Court: Cross-examine.

Cross-Examination by Mr. Shulman.

Q. Mr. Richards—

Mr. Shulman: Well, to the extent that the Court—

The Court: Cross-examine on all of the issues.

Mr. Shulman: In five minutes, your Honor?

The Court: Well, I think that five minutes will be ample time.

Mr. Shulman: All right. To this extent, let the record show that we strenuously disagree with what this witness has testified to as to the fact; we believe that we are correct on the law and we will waive our cross-examination without—

[94] The Court: I don't think that you should waive your cross-examination. You had better cross-examine him. I want the whole record to be made.

Mr. Shulman: Well, I submit that we will have difficulty in terms of five minutes.

The Court: Well, see what you can do.

Mr. Shulman: All right.

By Mr. Shulman:

Q. Now, you say that in 1967 nobody came out onto the job, is that right, Mr. Richards?

A. To my knowledge.

Q. Oh, "to my knowledge"?

But it is possible that somebody did come onto the job?

A. There could be 100 people drive through there. They didn't talk to me.

The Court: Nobody talked to you, is that what you are saying?

The Witness: They didn't contact me.

The Court: All right. Go ahead.

By Mr. Shulman:

Q. Now, in 1967, you said that you had a couple of pieces of equipment, is that right?

[95] A. Yes; I had a couple of pieces of equipment.

Q. All right. In 1966 you subcontracted out a lot of this work to Gene Arnold?

A. I had two pieces of equipment in 1966.

Q. The question is, in 1966 you subcontracted a lot of this work out to Gene Arnold, is that right.

A. That is right.

Q. So that you wouldn't have been responsible for it, Gene Arnold was?

A. Yes.

Q. And Gene Arnold was a member of Local 150?

A. Yes.

Q. As a matter of fact, you paid him every three or four weeks for the work that he was doing, didn't you?

A. Yes.

Q. He wasn't an employee, as such?

A. No.

Q. Now, in 1967 you kind of shuffled back and forth your people on these various pieces of equipment, didn't you?

A. Yes, sir.

Q. And this would have been a violation of the union rules, wouldn't it?

[96] A. I have no knowledge of the union rules; I have never operated—

Q. Well, the fact that you were operating with non-union people would certainly have been a violation of the union rules, wouldn't it?

A. Non-union is a violation of the union rules, yes.

Q. All right. And as to Arnold in 1965 and 1966, that wouldn't have been a violation, would it?

The Court: You don't have to ask him that, counsel.

Go ahead with your questions, questions that mean something.

By Mr. Shulman:

Q. In 1967—they did come out in 1968, didn't they?

A. Yes.

Q. And if they had gotten complaints in 1967, they might have come out in 1967, isn't that right?

A. I don't know.

The Court: Well, let's not—

Mr. Shulman: All right, your Honor. We won't proceed any further with cross-examination. We will rest our case.

[97] The Court: Let me ask you this. You are definitely certain in your mind, are you, that after this one man was signed up, that he stayed on the job a couple of weeks and that during that two weeks this Mr. Meagher did not come out and complain at any time that you were deducting from his pay enough money to reimburse you for his union dues?

The Witness: No, sir.

The Court: You are certain as to that?

The Witness: Yes, sir.

The Court: All right.

The Witness: I had no knowledge of Jerry Rumsey's complaint because it was an agreement between him that I would pay his union dues, get him the card, and this money would come back some way out of his wages. So this is what—I didn't pay union scale because I had the $175 coming back to me, because it is not a practice for contractors to buy union cards for—

The Court: How do you join up in a union, by—

Mr. Shulman: If the Court please, he is [98] not joining, up, it is—

The Court: By having one employee—

Mr. Shulman: "How do you join up?" If your Honor please—

The Court: By having one employee and paying his dues, does that mean—

Mr. Shulman: He isn't joining up, your Honor, it is the employee who is joining up. This is an owner of a development or of a job; he is the contractor.

The employee whom he employs is required, if the union asks and if the employer acquiesces, to join the union; they sign a contract and then there is an initiation fee. Normally, the employee pays it. In this case the employer advanced it for him. This is one of the issues that undoubtedly is going to come up in arbitration.

But there is no question here that the man signed the memorandum of agreement, received a copy of the contract, he says, in the mail. So, in terms of an issue, the contract was in existence.

The Court: Well, what happens from then [99] on? I mean—

Mr. Shulman: Then there is just—

The Court: What about the next man who comes on?

Mr. Shulman: After seven days, he is required to join. But here we had a subcontract.

The Court: Because of taking the one man in?

Mr. Shulman: That is right. Here we had a subcontract, so that means for the subcontractor he—

The Court: Well, I understand that.

Mr. Shulman: All right. Well, we would so move.

Mr. Murphy: We also had our own equipment in addition to the subcontractor, which, according to their theory, should have been operated by a union member.

I have two questions, just to complete my examination.

The Court: All right.

[100] *Redirect Examination by Mr. Murphy.*

Q. Firstly, Mr. Richards, did you ever make or receive any requests for welfare payments from the union?

A. No, sir.

Q. And did you ever receive a copy of the 1966 master agreement with the Fox Valley General Contractors and the Union?

A. No, sir.

The Court: Is that the new one?

Mr. Murphy: That's the new one.

The Court: All right. Any further questions?

(No response.)

The Court: All right. I will take this under advisement and send you a letter, gentlemen, as to the decision.

(Witness excused.)

Mr. Baum: Thank you, your Honor.

Mr. Murphy: Thank you, your Honor.

The Court: Yes. All right.

(Which were all the proceedings had in the above-entitled cause on the day and date as aforesaid.).

[101] IN THE UNITED STATES DISTRICT COURT,

Northern District of Illinois,

Eastern Division.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO, *Plaintiff*, *vs.* FLAIR BUILDERS, INC., *Defendant.*	No. 68 C 2091.

CERTIFICATE.

I, Robert J. Betz, Do Hereby Certify That the proceedings had in the above-entitled cause before the Honorable Bernard M. Decker, one of the Judges of said Court, on Frid , October 24, 1969, were reported by me in shorthand, and that the foregoing typewritten transcript consisting of pages 1 to 100, inclusive, is a true, correct and complete report of my official shorthand notes to made as aforesaid.

/s/ ROBERT J. BETZ,
Robert J. Betz
Official Court Reporter
U. S. District Court
Northern District of Illinois
Eastern Division

PLAINTIFF'S EXHIBIT NO. 1.

Local No. 150
302 Tower Bldg.
Elgin, Ill. 60120

Building—Illinois
Will, Kendall, Grundy, Kane & Kankakee Counties.

COLLECTIVE BARGAINING AGREEMENT.

This Agreement made and entered into this First Day of June 1963 by and between the Will Co. Contractors, Chicago Outer Belt Contractors Association and the Fox Valley General Contractors Association covering Will, Kendall, Grundy, Kane and Kankakee Counties, Illinois, and the individual members thereof individually, hereinafter, for convenience, referred to as the "Employer", first parties, and the International Union of Operating Engineers, Local Union 150, AFL-CIO, hereinafter, for convenience, referred to as the "Union", second party.

This Agreement is based upon the understanding that the Employer and the Union have a common and sympathetic interest in the Construction Industry. Progress in the industry demands a mutuality of confidence between the Employer and the Union. Accordingly, a working system and harmonious relations are necessary to improve and further the relationship between the Employer, the Union and the public, so that all will benefit by continuous peace and by adjusting any differences by rational common sense methods.

This Agreement, shall be in full force and effect for Three Years (3) from June 1, 1963 to May 31, 1966. It is agreed that the first wage rate which is effective June 1, 1963, shall be paid retroactive.

Now Therefore, it is hereby Agreed as follows:

Article I.

Section 1. Bargaining Unit—This Agreement shall apply to all work within the occupational jurisdiction of the Union and performed by this craft. The bargaining unit shall consist of all employees engaged in such occupational and craft work and the Employer recognizes the Union as the sole and exclusive bargaining representative for all of the employees in the bargaining unit with reference to wages, hours of work and all other terms and conditions of employment. Only the employees in the bargaining unit shall perform the work covered by this Agreement.

Scope—This Agreement shall apply to all classifications listed below and in Article III hereof, to the Operation, Maintenance and Repair of all equipment used in all kinds of building work.

Gradall
Rollers
Boilers
Pumps
Power Shovels & Cranes
Clam Shells
Concrete Mixers
Dinky Locomotives
Cable Ways
Bull Floats
Bull Dozers
Tractors
Continental)Diggers
Le Tourneau &) &
Similar Types) Scoops
Concrete Spreaders
Conveyors, Etc.

All Derricks
Winch Trucks, Handling Material
Generators
Air Compressors
Locomotives
Dredges
Trench Machines
Tractor Shovels
Stone Crushers
Loading Devices
Asphalt Plants
Redi-Mix Plants
Pumpcrete
Heaters
Derrick Cars
Pile Drivers
Fork Lifts

Boom Tractors
Air Tuggers & Single Drum Hoists
Mechanical Heaters
Truck Crane Drivers
Overhead Cranes
Elevators Hoisting Material
Welding Machines—Gas or Diesel
Power & Elevating Graders
Finishing Machines
Tamping Machines
Resurfacing Machines
Small Tractors Pulling Rollers, Disk or Plows
Engines

Section 2. Union Shop—All employees shall be obligated to become members of the Union after the 7th, but not later than the 10th day of employment, the date of the execution of this Agreement or the effective date of this clause, whichever occurs later, as a condition of continued employment. All employees who are members of the Union shall maintain their membership in the Union as a condition of continued employment. Any employee who fails to become a member of the Union or fails to maintain his membership therein in accordance with the foregoing shall forfeit his right of employment, and the Employer shall immediately discharge such employee, provided, however, that the foregoing shall be strictly interpreted, construed and applied in accordance with the applicable provision or provisions of the National Labor Relations Act, as amended. In the event of the amendment or repeal of such legislation rendering possible a higher type of union security, such higher form of security shall automatically become effective when the same is legal and permissible. If it is necessary to execute any amendment to this Agreement at a later date for such purpose in order to make such additional union security legal, then the parties shall execute such amendment immediately upon being requested to do so by the Union.

Section 3. Notice on Leaving Job—No employee shall leave his job without giving due notice to his Employer, and the Business Representative of the Union.

Section 4. Discharge—Any employee loafing on the job to extend his time, or coming on the job under the influence of intoxicating liquors, or bringing intoxicating liquors on the job, may be discharged by his employer, or for any other just cause. The Employer shall notify the Union within twenty-four (24) hours of the discharge of such employee.

Section 5. (A) Grievances and Arbitration—Whenever any difference or dispute shall arise as to interpretation or application of the terms of this Agreement, such dispute or difference shall be resolved in the following order:

(1) In conference between the business agent and the designated representative of the employer.

(2) In the event the dispute cannot be so resolved within twenty-four hours, it shall then be referred to conference between designated officers of the Union and the Associations.

(3) Unless so resolved within forty-eight hours, the matter shall then be submitted to a Board of five arbitrators, who shall commence the Arbitration talks within 48 hours after they have received notice of complaint. Two to be selected by the Union, two to be selected by the Associations, and the fifth to be chosen by the four so selected. Upon the failure to so select a fifth arbitrator within 48 hours, the selection shall then be made in accordance with the rules and procedures of the American Arbitration Association.

(B) Hearing—The Board of Arbitration so selected shall hear all evidence and render its decision by a majority vote based on evidence and the contract.

(C) Decision—The decision so rendered shall be final and binding upon both the Union and the Employer.

Section 6. Work Stoppage—There shall be no stoppage of work by the Union Officers and Business Representatives until all of the procedures set forth in the foregoing Section 5, Article 1, have been exhausted.

Section 7. Discrimination—The Employer agrees that there shall be no discrimination against any member of the Union, any Officer, Steward or member serving on any committee authorized by the Union.

Section 8. Jurisdictional Award—Unless determined by Jurisdictional Award, as hereinafter set forth, all work that has been heretofore performed under agreement or by custom or by area practice with any other local organization shall continue to be so performed until such Jurisdictional Award is made. Whenever a jurisdictional dispute shall arise between local labor organizations, the provisions of the Agreement shall prevail until a Jurisdictional Award has been made by the proper Jurisdictional Board of the International Unions of which the local disputing Labor Organizations are members. Associations agree to abide by such Jurisdictional Award, but there shall be no work stoppage while the settlement of the dispute is pending.

Article II.

Section 1. Hours and Overtime Hours—Eight (8) Hours shall constitute the working day from the hours of 8:00 A.M. to 12:00 P.M. and 12:30 P.M. to 4:30 P.M.; and Forty (40) Hours shall constitute a week's work from Monday through Friday inclusive. All time worked before 8:00 A.M. and after 4:30 P.M. shall be considered overtime and shall be paid for at the overtime rate provided for in this Agreement.

Section 2. Overtime and Holidays—All time worked before 8:00 A.M. and after 4:30 P.M. and on Saturday shall be paid for at double the regular rate. If the operator works on his machine during the regular lunch period, he shall receive double the regular rate for same. Oilers shall oil their machines during the regular lunch or the operator's lunch period. At no time shall an Oiler or Fireman prepare a boiler or rig without an operator.

The above overtime rates of pay in this section shall apply to moving equipment.

All work done on Sundays and Holidays shall be paid for

at the double time rate. Holidays recognized by the terms of the Agreement shall be: New Year's Day, Decoration Day, Fourth of July, Labor Day, Armistice Day (Nov. 11), Thanksgiving Day and Christmas Day, or the days celebrated as such. No work shall be done on Labor Day, except to save life or property.

Section 3. Master Mechanic—In the event a Contractor employs ten (10) or more men on any one project, a Master Mechanic shall be appointed by the Employer. Such Master Mechanic shall not exercise any of the functions customarily exercised by supervisors within the definition contained in the Labor-Management Relations Act of 1947, as amended. The Master Mechanic shall in no way be deemed to be an agent of the Union.

Section 4. Report for Work Pay—Employees who are requested to work and report for work and are informed prior to 8:00 P.M. that they will not work that day shall receive two hours' pay. Employees starting to work at 8:00 A.M. shall receive a full day's pay. On overtime days, Saturdays, Sundays and Holidays, employees who are requested to report for work, and report for work, and are informed prior to 8:00 A.M. that they will not work that day, they shall be paid two hours' pay at the overtime rate. Employees starting to work at 8:00 A.M. or regular starting time, shall receive eight hours' pay at the overtime rate.

Section 5. Mechanical Heaters—On one to five mechanical heaters, one engineer shall be utilized. Every multiple of five heaters or any part thereof shall require one engineer for each such multiple or part thereof.

Section 6. Firemen and Oilers—Firemen shall be required on all Steam Cranes, Oilers shall be required on all Cranes and Shovels of ¾ yd. capacity or over, except all Truck Cranes, which shall require an operator and oiler.

Working conditions shall be the same as those for Engineers.

Section 7. Oiling and Greasing Equipment—Employees on all cranes up to ¾ yd. capacity not requiring an oiler shall be paid one-half hour at the overtime rate for oiling and greasing their equipment.

Engineers operating Large Hoist & Derricks of 2 Drums or more shall start One-Half Hour before the regular starting time to get the machine ready for the regular starting time and be paid at the regular overtime rate of pay for the extra One-Half Hour. This paragraph to apply only if machine is to be used at regular starting time.

Section 8. Boom Length—Any boom over 100 ft. in length, operater shall receive twenty-five (25¢) cents per hour over the regular crane rate.

Section 9. Protection and Heat—Reasonable protection, heat and sanitary conditions shall be provided for the employee and the machinery he operates.

Section 10. Two or More Machines—5 H.P.—If an individual employer operates two or more machines developing less than 5 H.P. on one job, the machines shall be operated by employees in the bargaining unit and in the event equipment is already on the job and is being operated by employees in the bargaining unit, any additional piece of equipment irrespective of H.P. shall be similarly operated by employees in the bargaining unit. This shall not apply to Saw Rigs, Grinding or Polishing Machines. In the case of Caisson work, small electric winches shall be operated by employees in the bargaining unit, but in the event an employee in the bargaining unit is already performing other work on the job, such employee may also operate certain small electric winches. This requirement need not apply for more than one shift in every twenty-four (24) hours.

Section 11. Concrete Mixer—In the event an individual employer operates more than one concrete mixer of one bag capacity with a side loader on the same job, such work shall be performed by employees in the bargaining unit. With the exception of concrete mixers of the 7-S size and under, all concrete mixers with skip hoist or side loader attached, irrespective of horespower shall be operated by employees in the bargaining unit.

Section 12. Hoist—Hoists, except small electric winches, irrespective of horsepower, used for hoisting materials shall be operated by employees in the bargaining unit. Where two or more electric winches are used on one job, they shall be operated by one employee in the bargaining unit and each two thereafter shall similarly be operated by one employee in the bargaining unit. It is understood that one automatic hoist used on buildings not over 50 feet in height above grade line, said 50 feet to be exclusive of penthouses, parapet walls or chimneys above the roof, shall require an employee specifically. If more than one automatic hoist is used on the same building, or a group of buildings, then one employee shall be utilized for the first two, three, four or five hoists as the case may be, and thereafter an employee shall be utilized for each five additional hoists, or portion thereof. On all buildings over 50 feet in height, as described, an employee must be utilized on all automatic hoists.

Section 13. Air Compressors—Each Air Compressor of 50 cubic feet or more, or where more than one compressor is used as a unit, shall be operated by employees in the bargaining unit.

Section 14. Operating Engineers shall be paid once a week in cash, money order, or negotiable check. Pay day to be on designated day not more than 5 days after pay period ends. If an operating engineer is laid off or discharged, he shall be paid at once. If an operator voluntarily quits or

resigns his job for any reason, he shall be paid on the regular pay day. On the check stub or on an accompanying slip shall be the following information: Regular hours, overtime hours, and legal deductions. In the event that any Employer-Member of the Associations or Employer Signatory to this Agreement has failed to pay the fringe benefits and/or has failed to have sufficient funds in the bank to meet all pay checks issued to the members of the Union, the Union shall have the right to immediately withhold and withdraw the services of its members from such Employer, provided, however, that the Union shall in case of an Association Member of subcontractor notify the Employer-Members' Association of such contract violation prior to commencing such action. This Section shall not be subject to the provisions of Section 5 of Article I.

Section 15. Washing Out Boilers—Employees shall wash out boilers when necessary in the opinion of the Employer, and shall receive the regular scale of wages.

Section 16. Shift Work—When work is carried on with two or other shifts of men working eight hours each, the starting time for shifts shall be: 8:00 A.M. for day shift; 4:00 P.M. for afternoon shift; 12:00 P.M. midnight for night shift. Then only Single Time shall be paid for both night and day work during the week days. Employees covered by this Agreement shall be allowed one-half hour for lunch of which there shall be no deduction from their pay.

Where shift work is performed from 12:01 A.M. Saturday to 12:00 P.M. Sunday, each shift shall be paid for at the rate of Double Time.

Pumps Heaters & Welders.

If, however, shift work is on Pumps, Heaters or Welders and Seven Days pumping, heating or welding is necessary to the job, then each shift shall be entitled to Time And One-Half for Saturdays and Double Time for Sunday.

When Six Day pumping, heating or welding is carried on from Monday to Saturday inclusive, Double Time shall be paid for Saturday.

Small Sump Pumps used intermittently to pump water from Piers or Foundations for short periods of time, shall not require a full-time Engineer.

This does not apply to Holidays, mentioned in Section 11 of Article 11, for which Double Time shall apply.

Employees reporting for work on shifts shall receive Two Hours' Pay for reporting. If an employee starts to work, he shall receive not less than Eight Hours' Pay.

Section 17. If working conditions warrant to change an operator from one machine to another in any one day's period, the operator shall be paid at the higher rate of pay for the Two (2) machines. Not more than one such change shall be allowed in any one day, except that the return to the original assigned machine shall not be considered a second change.

Section 18. Each operator shall be responsible for the maintenance of the machine he operates.

Section 19. Fireman on Boilers—In the event a fireman, oiler or an apprentice is placed on a boiler, such individual shall receive the boiler rate of pay, as listed in Article III.

Section 20. (A) Job Steward: Selection—The job steward shall be selected, in such manner as the Union may require, from among the members of the bargaining unit in the employ of the Employer and working at the job site. The job steward shall have no special employment priority or security. A steward so selected shall have such qualifi-

cations as required by the Union, or until qualified, shall be acting steward. The Union shall have the right to designate which employee shall be the steward or acting steward on any new construction project.

(B) Job Steward: Authority — The job steward's duties functions, and responsibilities shall be limited to receiving complaints from the members concerning Health & Welfare, Pension, checking the dues standing, checking the job violations and reporting to the appropriate Business Representatives. The job steward shall not have authority to seek adjustment of violations of any Collective Bargaining Agreement, nor shall he have the authority, or be deemed to have the authority, nor shall he act to cause, or attempt to cause in any fashion whatsoever, any person to cease from any action in violation of, or in furtherance of, any Collective Bargaining Agreement. The job steward shall report all violations to the Business Representative of the Union servicing his job or project for appropriate action. He shall not under any circumstances collect any money due or payable to the local Union from any member or applicant for membership or any other person. The Steward's Union duties shall in no way interfere with his duties as a working employee.

Article III.

The following wage scales shall prevail during the calendar years specified:

	6/1/63	6/1/64	6/1/65
Air Compressors	$3.40	$3.45	$3.50
All Boilers & Motors	3.40	3.45	3.50
Asphalt Plants or Batch Plants	4.00	4.15	4.25
Asphalt Spreaders	3.65	3.80	3.90
Blade Graders, (Manually operated)	3.40	3.45	3.50
Bull Dozers & Tractors	3.80	3.95	4.05
Bull Float	3.65	3.80	3.90
Cranes, used for Excavating	4.45	4.60	4.70
Cranes, Mobile or Overhead	4.45	4.60	4.70
Clam Shells, used for Rehandling Material or Loading Hoppers	4.45	4.60	4.70
Combination of Compressor & Tugger Hoist	4.45	4.60	4.70
Combination of Compressor & Welding Machine	4.45	4.60	4.70
Concrete Spreaders	3.65	3.80	3.90
Concrete Towers (3/4 yard or over)	4.45	4.60	4.70
Curb, Sidewalk, Culvert & Bridge Mixers	3.45	3.60	3.70
Austin Diggers	3.90	4.05	4.15
Draglines	4.45	4.60	4.70
Small Electric Winches & Sagen Hoists	3.90	4.05	4.15
Engineers, acting as Conductors or Yard Masters	3.45	3.60	3.70
Elevators—Hoisting Materials	4.45	4.60	4.70
Finishing Machines	3.65	3.80	3.90
Forklifts & other similar types equipment	3.90	4.05	4.15
Fordson Combination Backhoe & Front End Loaders	3.90	4.05	4.15
Graders, Elevating	3.55	3.70	3.80
Graders, Form	3.55	3.70	3.80
Graders, Sub	3.65	3.80	3.90
Gradall	4.45	4.60	4.70

	6/1/63	6/1/64	6/1/65
Front End Loaders & Highlifts	3.90	4.05	4.15
Hoist, Brick (Inside or outside of stacks)	4.45	4.60	4.70
Hoist, elevator, material	4.45	4.60	4.70
Hoist, Single Drum	3.55	3.70	3.80
Hoist, Two Drum	3.90	4.05	4.15
Hoist, Two Tugger	4.45	4.60	4.70
Hoist, Large Derricks (2 Drums or more)	4.45	4.60	4.70
Highlift Shovels (4 yd. capacity or more)	4.45	4.60	4.70
Highlift Shovels	3.90	4.05	4.15
Le Tourneaus	3.90	4.05	4.15
Dinky Locomotives	3.65	3.80	3.90
Material Handling Devices, Conveyors, etc.	4.45	4.60	4.70
Mechanical Heaters (1 to 5)	3.25	3.30	3.35
Orange Peels	4.45	4.60	4.70
Pavers & Mixers (27E or over)	4.45	4.60	4.70
Pavers & Mixers (Under 27E)	3.95	4.10	4.20
Patrols, Motors, Power Blades	3.90	4.05	4.15
Pile Drivers	4.45	4.60	4.70
Pull Shovels	4.45	4.60	4.70
All Pumps	3.25	3.30	3.35
Power Shovels & all other machines as may be substituted for same on Excavating	4.45	4.60	4.70
Pump Cretes	3.90	4.05	4.15
Rollers, Grade	3.55	3.70	3.80
Rollers, except Grade Rollers	3.65	3.80	3.90
Scoops, Continental	3.90	4.05	4.15
Surfacing & Retreading Machines	3.90	4.05	4.15
Stone Crushers	3.55	3.70	3.80
Steam Rigs of all Types	4.45	4.60	4.70
Tamping Machines	3.55	3.70	3.80
Tank Car Heaters	3.40	3.45	3.50
Tractors, Side Boom	3.75	3.90	4.00
Small Tractors, pulling Rollers, Disc or Plows	3.55	3.70	3.80

	6/1/63	6/1/64	6/1/65
Truck Crane Drivers	3.25	3.30	3.35
Trench Machines	4.45	4.60	4.70
Tournapulls	3.90	4.05	4.15
Winch Trucks (A) Frame	3.75	3.90	4.00
Well Point Systems	3.65	3.80	3.90
Welding Machines	3.40	3.45	3.50
Generators	3.40	3.45	3.50
Apprentice Engineers, Firemen & Oilers	3.25	3.30	3.35
Master Mechanic (All year round scale)	4.60	4.75	4.85
Mechanics, (All year round scale)	4.10	4.25	4.35
Maintenance Work Engineers, Winter—December 1st to April 15th	3.30	3.30	3.30
Helpers—Maintenance	3.00	3.00	3.00
Small Rubber Tire End Loaders, Loading Small material Hoppers for small Concrete Mixers or the cleaning up of debris	3.60	3.60	3.60

It is understood and agreed by the Employer and the Union to meet and negotiate and fix a wage scale on all equipment not listed in this Agreement which comes under the jurisdiction of the Union within ten (10) days after notice from either party.

Article IV.

Welfare Fund—It is understood and agreed that each Employer shall, commencing June 1, 1963, pay Ten ($.10) cents per hour for each hour worked by the employees covered by this Agreement to the Health and Welfare Fund, International Union of Operating Engineers, Local Nos. 150, 150A, 150B and 150C.

The Welfare Fund has been established and is to be administered in accordance with the provisions of the National Labor-Management Relations Act, as amended.

The Welfare Fund maintains a place of business at 150 North Dearborn Street, Chicago 10, Illinois.

Contributions of Employers shall be forwarded to such business office, together with report forms supplied for such purpose, not later than the 10th day of the following month.

Contributions to the aforesaid Health and Welfare Fund shall not constitute or be deemed wages due to the employee.

It is understood and agreed that the sole liability of the Employer under this welfare program shall be the payment of the contribution to the aforesaid Health and Welfare Fund commencing June 1, 1963 at the rate of Ten ($.10) cents per hour for each hour worked by an employee covered by this Agreement.

If contributions of the Employer are not made by the 20th day of the month on which contribution is to be paid, the Employer shall be liable for any claim that may arise on account of such nonpayment.

Pension Fund—It is understood and agreed that there shall be created a Trusteed Pension Plan to be known as the Northern Illinois and Indiana Pension Fund of the International Union of Operating Engineers, Local Nos. 150, 150A, 150B and 150C.

Said Fund shall be administered by a board of eight (8) trustees, four of whom shall be designated by the Union as representatives of the Union and four of whom shall be designated by the Associations as representatives of the Associations.

Effective June 1, 1963, each Employer shall become liable to contribute Ten ($.10) cents per hour for each hour worked by the employees covered by this Agreement to the aforesaid Pension Trust Fund.

The Pension Trust Fund shall be administered in accordance with all provisions of applicable law.

The Trustees of the Pension Trust Fund shall maintain a place of business at 510 North Dearborn Street, Chicago 10, Illinois, or at such other place as designated by the Trustees.

Contributions to the Pension Trust Fund shall not constitute or be deemed wages due to the employee.

The sole liability of the Employer shall be the payment of the contributions as in this Article IV provided.

Article V.

Section 1. Insurance Coverage—For all employees covered by this Agreement, the Employer shall carry Workmen's Compensation Insurance with a Company authorized to do business under the Applicable State Laws and Regulations, and shall in addition pay the tax necessary to secure for all such employees the benefits of the Illinois Unemployment Compensation Insurance Act irrespective of the number of employees employed.

Section 2. Insurance Safety Sanitation—The Contractor must make adequate provision to comply with all the rules and laws pertaining to Insurance, Safety and Sanitation as are established by the statutes of the Federal, State and Municipal Governments where the work is in progress.

Section 3. Access to Premises—The only authorized representative of the Union shall be allowed access to any building or job at any time where employees in the bargaining unit are employed. For this purpose it shall be the duty of the Employer to provide adequate passes, as requested by the Union, provided, the Employer is able to do so.

Article VI.

Hiring—When an Employer performs work covered by this Agreement in the areas covered by Local Union No. 150, the following shall apply: The Employer will obtain all employees used in the performance of such work through the Referral Offices of the Local Union in accordance with the non-discriminatory provisions governing the operation of the Local Union's Referral Offices set out in an Addendum No. 1 to this Agreement as if set forth in full herein.

Article VII.

Re-Opening Clause on Apprenticeship Training Program—This contract shall be re-opened in One (1) year, June 1, 1964, for the inclusion of a journeymen and apprenticeship training program.

Articel VIII.

Sub-Contractor—Any contractor who sub-contracts any of his work on any propect he has in the territory covered by this Agreement shall sub-contract the same subject to the terms of this Agreement. The prime contractor will in no way be held responsible for the non-payment of wages or any other violation of this Agreement by the sub-contractor.

Article IX.

Saving Clause—Any provision contained herein that is contrary to or held to be in violation of the Labor Management Relations Act of 1947, or any Federal Law now in force or hereafter enacted, or hereafter becoming effective shall be void and of no force or effect, and this contract shall be construed as if said void provision herein were not part therof, it being intended, however, that the other provisions of this contract shall not be affected thereby.

It is further agreed that should compliance with any Federal Law, or amendment thereof, or any order or regulation issued thereunder, now or hereafter in force and effect, prohibit the carrying out of any of the provisions of this Agrement then to the extent of such deviation or prohibition, this Agreement shall be deemed to have been automatically amended, effective on the effective date of such law, order, or regulation.

Such amendment to this contract shall remain in effect only so long as said law, amendment, order to regulation continues in force, or until the expiration of this Agreement, whichever event shall first occur.

Article X.

Entire Agreement of the Parties.

This represents the entire Agreement of the parties, it being understood that there is no other agreement or understanding, either oral or written. The Employer understands that the Union is a fraternal society and as such and, in keeping with the provisions of the Labor-Management Relations Act of 1947, as amended, has the right to prescribe its own rules and regulations with respect to the acquisition or retention of membership in the Union or with respect to any other matters for its own use. However, such rules or regulations whether contained in a bylaws, constitution or otherwise shall have no effect, directly or indirectly upon this collective bargaining agreement, any employment relationship or the relationship between the parties.

Article XI.

It is agreed by the parties hereto that this Agreement shall remain in force and effect from June 1, 1963 to May 31, 1966, except that either Party, on or before January First, immediately preceding the expiration of the Agreement, the Negotiating Committee, if requested in writing by either Party hereto, shall meet and fix the wages and conditions for the ensuing year.

This Agreement, if possible, shall be consummated and signed One Hundred and Twenty Days (120) prior to its expiration so that Contractors may have ample time to place Agreement into effect on day after its expiration for the following year.

In Witness Whereof, the parties have executed this Agreement the ..... 1963.

Representing the:

WILL CO. CONTRACTORS, THE FOX VALLEY GENERAL CONTRACTORS ASSOC. AND THE CHICAGO OUTER BELT CONTRACTORS ASSOC.

WILL CO. CONTRACTORS ASSOCIATION

JOHN D. SIMPSON
GEO. M. ALBRIGHT

CHICAGO OUTER BELT CONTRACTORS ASSOC.

STANLEY H. TRYGG
LA VERNE S. BROWN

FOX VALLEY GENERAL CONTRACTORS ASSOC.

JAMES BANNISTER

Representing the:

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL #150, AFL-CIO

BY WM. F. MARTIN
President

GLENN E. STONE
RAYMOND W. GAVIN
AMBROSE J. MEAGHER
SAMUEL D. CHRISS

PLAINTIFF'S EXHIBIT NO. 2.

MEMORANDUM OF AGREEMENT.

This Agreement made an entered into by and between Flair Builders Inc., Box 252, Sugar Grove, Ill., hereinafter referred to as the "Employer", First Party, and Local 150, International Union of Operating Engineers, hereinafter referred to as the "Union", Second Party.

This Agreement is made in consideration of the mutual promises of the First and Second Parties and the parties do hereby agree as follows:

1. The Employer recognizes the Union as the sole and exclusive bargaining representative for and on behalf of the employees of the Employer within the territorial and occupational jurisdiction of the Union.

2. The Parties do hereby adopt the Agreement dated June 1, 1963 by and between the Union and the Fox Valley General Contractors Assoc., and the parties do hereby mutually agree to be bound by the terms and conditions of the Agreement, the Health and Welfare Trust, and the Pension Trust, including the per hour contributions provided therein, and the Trust Agreement creating same.

3. This Agreement and the adoption of the Agreement and Trusts referred to in paragraph 2 above, shall be effective as of May 12, 1964, and remain in effect to and including the expiration date of the Agreement adopted herein. This Agreement shall continue in effect from year to year thereafter and specifically adopt any Agreement entered into between the Union and Fox Valley Gen. Contr's Assoc., subsequent to the expiration date of the Agreement herein adopted unless notice of termination or amendment is given in the manner provided herein.

4. Either Party desiring to amend or terminate this Memorandum of Agreement must notify the other in writing at least three calendar months prior to the expiration of the Agreement adopted herein.

In Witness Whereof, the Parties have executed this Memorandum of Agreement the 12th day of May, 1964.

FLAIR BUILDERS, INC.	LOCAL 150, INTERNATIONAL UNION OF
Employer	OPERATING ENGINEERS, AFL-CIO
BY /s/ ROBERT W.	BY /s/ W. F. MARTIN
RICHARDS	/s/ GLENN E. STONE
President	/s/ A. J. MEAGHER

PLAINTIFF'S EXHIBIT NO. 3

COLLECTIVE BARGAINING AGREEMENT

between

International Union of
Operating Engineers

Local No. 150
AFL-CIO

and the

Builders Associations
Will County Contractors
Chicago Outer Belt Contractors Assoc.
Fox Valley General Contractors Assoc.
Covering Will, Kendall, Grundy, Kane
and Kankakee Counties

Effective June 1, 1966
Thru May 31, 1970

Amended May 10, 1967

Introduction

Building Agreement
Chicago Outer Belt Contractors Assn.

This Agreement will provide each party to it (the Union Members and the Contractor Members) with the assurance that, for the term for which it was written, an honest, honorable and respectable remuneration to the workmen, and the contractors will receive service, cooperation and ability to get the job done.

This Labor Agreement was designed to satisfy the needs of the construction industry, the people of the industry and the entire general public. It is yours now, to be administered wisely, adhered to in every respect, and defended to the utmost.

Respectfully with dedication,

International Union of
Operating Engineers
Local No. 150

Officers

William F. Martin	Pres., Bus. Mgr.
Raymond W. Gavin	Vice President
Lester Doogan	Rec. Corres. Sec'y
Harry Baker	Fin. Sec'y
Clarence Donath	Treasurer

Collective Bargaining Agreement.

This Agreement made and entered into this First Day of June 1966 by and between the Will County Contractors, Chicago Outer Belt Contractors Association and the Fox Valley General Contractors Association covering Will, Kendall, Grundy, Kane and Kankakee Counties, Illinois, and the individual members thereof, individually, hereinafter, for convenience, referred to as the "Employer," first parties, and the International Union of Operating Engineers, Local Union 150, AFL-CIO, hereinafter, for convenience, referred to as the "Union," second party.

This Agreement is based upon the understanding that the Employer and the Union have a common and sympathetic interest in the Construction Industry. Progress in the industry demands a mutuality of confidence between the Employer and the Union. Accordingly, a working system and harmonious relations are necessary to improve and further the relationship between the Employer, the Union and the public, so that all will benefit by continuous peace and by adjusting any differences by rational common sense methods.

This Agreement, shall be in full force and effect for Four (4) Years from June 1, 1966 to May 31, 1970. It is agreed that the first wage rate which is effective June 1, 1966, shall be paid retroactive.

Now Therefore, it is hereby Agreed as follows:

Article I.

Section 1. Bargaining Unit—The Bargaining unit shall consist of all employees engaged in work covered by the occupational jurisdiction of the Union with reference to any and all of the classifications described in Article I, Section 3, "Scope of Work," the wages and hours of work and all

other terms and conditions of employment set forth in this Agreement, and the operation, maintenance, and repair of equipment covered by this Agreement as used on building and construction work.

Section 2. Recognition—The Association recognizes the Union as the sole and exclusive bargaining agent for all employees employed in work covered by the occupational jurisdiction of the Union by employers who are now members of the Association, or such Employers as may hereafter become members of the Association. The Union recognizes the Association as the sole and exclusive bargaining agent for its member and for such other firms, persons or corporations as may hereafter become members of the Association. All other Contractor Employers engaged in work covered by classification in this Agreement and the occupational jurisdiction of the Union shall be subject to the terms of this Agreement.

Section 3. Scope of Work—This Agreement shall apply to the work classifications and operations incidental thereto as are generally accepted as Building Construction such as:

Construction, erection, modification, addition to or improvement of a building structure or structures, the construction, erection, modification, addition to or improvement of an industrial plant or commercial construction and the driving of sheeting, piling, caisson work, foundation work or dewatering or any work directly related to the aforementioned types of building construction, including railroad spurs other that the main railroad right of way.

Section 4. Union Shop—All employees covered by this Agreement shall be obligated to become members of the Union after the 7th, but not later than the 10th day of employment, the date of the execution of this Agreement or the effective date of this clause, whichever occurs later, as a condition of continued employment. All employees who are members of the Union shall maintain their membership in

the Union as a condition of continued employment. Any employee who fails to become a member of the Union or fails to maintain his membership therein in accordance with the foregoing shall forfeit his right of employment, and the Employer shall immediately discharge such employee upon receipt of written notice from the Union, provided, however, that the foregoing shall be strictly interpreted, construed and applied in accordance with the applicable provision or provisions of the National Labor Relations Act, as amended.

Section 5. Fringe Benefit Reopener—It is understood that for the years 1968 and 1969 the Union reserves the right to reopen the contract for the purpose of having a portion of the wage increase already agreed upon for those years placed into the fringe benefits funds as designated by the Union, provided, however, that the Union will notify the Employer at least sixty (60) days prior to the date upon which such wage rate is to go into effect of the reopening of the Agreement for the aforementioned limited purpose.

Section 6. Pre-Job Conference—The Union reserves the right to withhold the services of its members until a pre-job conference is held. The conference shall be held on the job site.

Section 7. Branches of Work—Except as hereinafter provided, operating all Engines and Boilers on Building and Construction Work operated by Steam, Hydraulic, Electrical, Compressed Air, Gas or Gasoline, or any other motive power, including Pumps, Pump Cretes, Stone Crushers, Air Compressors, Welding Machines, Conveyors, Cableways, Clamshells, Derrick Cars, Generators, and Motors, Overhead Cranes, Orange Peel Buckets, Pile Drivers, Floating Derricks, Locomotives, Locomotive Cranes and all Elevators used for Hoisting Material for Building Construction or for alteration work, shall require an Engineer.

Article II.

Section 1. Arbitration—Should any difference arise between the parties hereto which cannot be settled by their representatives, within 48 hours of the occurrence, such difference shall be submitted to arbitration. Each side shall select two arbitrators other than the representatives who failed to agree and the four arbitrators shall select a fifth arbitrator. Such Board of Arbitrators shall meet within six (6) days and a decision of the majority of this Board shall be accepted by both parties. In the event the parties cannot agree upon a fifth arbitrator, each side shall jointly request the American Arbitration Association to submit a panel of seven (7) recognized arbitrators and by the striking of names, the parties shall arrive at the name of an arbitrator. The parties shall draw straws to determine who shall strike the first name. The expenses of the arbitrator shall be borne equally by both sides. The decision of the Arbitration Board shall be final, binding and conclusive on all parties to the arbitration. There Shall Be No Stoppage of Work by the Union or Employer for a Period of Fifteen (15) Days After Notice While Differences Are Being Resolved by the Above Procedure.

Section 2. Bonding of Employer—The Union may, at its discretion, demand a payment bond of any Employer guaranteeing payment of all earnings and welfare and pension benefit contributions which may become due.

Section 3. Penalty for Failure to Pay Wages or Fringe Benefits—(A)—Wages—If any employer fails to pay wages, the arbitration procedure herein provided for shall become inoperative and the Union shall be entitled to resort to all legal and economic remedies including the right to strike and picket until such failure to pay has been corrected.

This clause shall be inoperative if the amount of wages

is bonafidely disputed. In such instance, the Employer shall then pay the wages admitted to be due and the balance shall be settled by the arbitration procedure as provided herein.

(B)—Pension and/or Health and Welfare and/or Vacation Contributions—If any Employer upon 48 hours' written notice of default to the Employer and the Builders' Association fails to pay pension or health and welfare or vacation contributions the arbitration procedure herein provided for shall become inoperative and the Union shall be entitled to resort to all legal and economic remedies including the right to strike and picket until such failure to pay has been corrected.

Section 4. Access to Premises—The duly authorized representatives of the Union shall be allowed access to any building or job at any time where employees in the bargaining unit are employed. For this purpose it shall be the duty of the Employer to provide adequate passes, as requested by the Union.

Section 5. No Discrimination—It is understood and agreed that the Employer shall not discriminate against any member of the Union, any of its officers, its stewards, or any member serving as a member of a committee authorized by the Union.

Section 6. (A) Insurance Coverage—For all employees covered by this Agreement, the Employer shall carry Workmen's Compensation Insurance with a company authorized to do business under the applicable State Laws and Regulations, and shall in addition pay the tax necessary to secure for all such employees the benefits of the Illinois Unemployment Compensation Insurance Act irrespective of the number of employees employed.

(B) Insurance Safety Sanitation—The Contractor must make adequate provisions to comply with all the rules and laws pertaining to Insurance, Safety and Sanitation as are

established by the statutes of the Federal, State and Municipal Governments where the work is in progress.

Section 7. Subcontractor—The Contractor agrees, that he, or any of his subcontractors on the job-site, will not contract or subcontract work to be done at the site of construction, alteration, painting, or repair of a building, structure, or other work, except to a person, firm or corporation, party to a current labor agreement with a union, or subordinate body, affiliated with the Building and Construction Trades Department, AFL-CIO, or with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or an affiliate thereof, commonly having jurisdiction over the class of work involved.

Section 8. Apprenticeship—It is mutually agreed by the parties that this contract may be opened at any time for the discussion of an apprenticeship program, and the non-discriminatory hiring provisions contained in Addendum I to this Agreement. The Union also agrees to an absolute no-strike agreement and the Association to an absolute no-lockout agreement upon failure to agree to a bona-fide apprenticeship program or any revision in the non-discriminatory hiring provision.

Section 9. Hiring—When an Employer performs work covered by this Agreement the following shall apply:

The Employer will obtain all employees used in the performance of such work through the Referral Offices of the Local Union in accordance with the non-discriminating provisions governing the operation of the Local Union's Referral Offices set out in Addendum I of this Agreement, as is set forth in full herein. In the event a Court of competent jurisdiction renders a judgment that the Union has discriminated against any person or persons in violation of any provision of this Article, either party may declare such provision null and void by giving written notice by registered or certified mail to the other party. It is further

agreed the Employer and Union shall meet to negotiate a new Hiring provision.

Section 10. Joint Board Decisions—In the event there arises any question regarding the occupational and/or craft jurisdiction of the Union, as it relates to any other Union the parties hereto agree to be bound by the decisions rendered by the National Joint Board for the Settlement of Jurisdictional Disputes as established by the Building Trades Department of the AFL-CIO. In no event shall there be stoppage of work by either party.

Article III.

Section 1. Job Steward—(A) Selection—The Job Steward shall be selected by the Union from among the members of the bargaining unit in the present employ of the Employer. The Job Steward shall be a working employee appointed by the Business Representative or selected by the members of the bargaining unit in the Employer's employ. The Union shall have the right to designate which employee shall be the Steward or Acting Steward on any new construction project. The Job Steward shall have no special employment priority or security. A Steward so selected shall have such qualifications as required by the Union, or until qualified, shall be Acting Steward.

(B) Authority—The Job Steward's duties, functions, and responsibilities shall be limited to receiving complaints from the members concerning Health and Welfare, checking the dues standing, checking the job for violations of the Collective Bargaining Agreement, and investigating and reporting to the appropriate Business Representative on his own time. The Job Steward shall not have authority to seek adjustment of violations of any Collective Bargaining Agreement, nor shall he act to cause, or attempt to cause in any fashion whatsoever, any person

to cease from any action in violation of, or in furtherance of, any Collective Bargaining Agreement. The Job Stewards shall report all violations to the Business Representative of the Union servicing his job or project for appropriate action. He shall not under any circumstances collect any money due or payable to the Local Union from any member or applicant for membership or any other person. The Steward's Union duties shall in no way interfere with his duties as a working employee.

Section 2. Regular Assigned Engineers—The Engineers, or crew, regularly assigned to a piece of equipment shall be given preference when this piece of equipment is required to work on a regular work day, Saturday, Sundays and Holidays, or other overtime.

Section 3. Shelter—The Employer agrees that reasonable protection and heat shall be provided for the Engineer and the machinery he operates. The operator shall be the judge of its sufficiency.

Section 4. Transportation—Whenever employees of the bargaining unit are employed in a mill, plant, refinery, terminal or other job site where the cannot supply their own transportation to within 3/10 mile of the site of the machine on which they are employed, the Employer shall furnish their transportation from the gate or entrance to their place of employment. Such transportation shall be furnished for a reasonable time before starting time and after quitting time on any shift or shifts to enable the employees to report for and leave work promptly.

Section 5. Notice on Leaving Job—No employee shall leave his job without giving notice to his Employer and the Union.

Section 6. Discharge—The Employer shall have the right to discharge any employee for just cause. The Employer shall notify the Union as soon as possible but in no event later than the close of business on the second regular working day after such discharge.

Article IV.

Section 1. Craft Foreman—Where an Employer contemplates employing eight (8) or more employees in the bargaining unit on any one project, the Employer shall employ a craft foreman and shall pay such individual the wages provided for in this Agreement. It is understood that the craft foreman will perform various duties until eight (8) employees of the bargaining unit are employed. After eight (8) men are employed, the craft foreman shall not operate equipment or do any repair work, except in emergencies, or in the temporary absence of the regular operator. The craft foreman shall be the lead man of the eight (8) or more employees in the bargaining unit. Such individual, however, shall neither have the authority to, nor shall he exercise any of the functions customarily exercised by supervisors within the meaning of the National Labor Relations Act, as amended. In no way shall such individual be deemed to be an agent of the Union.

An Operating Engineer servicing and maintaining the following listed Category III machines—Small Air Compressor up to 110, Small Generator up to 50 KW, Mechanical Heaters, Small Electric Winches, Air Cooled Welding Machines, Pumps 3 inch and under, Hoists Automatic, Portable Conveyor, Steam Generators, and Winches, 4 small electric—shall not be counted as employees in the bargaining unit in determining the number of men in the bargaining unit requiring a craft foreman.

The Craft Foreman shall remain on the project if four (4) or more employees in the bargaining unit are working overtime.

The above provisions shall apply to all shift work done pursuant to the terms of this Agreement.

Article V.

Section 1. Work Day—Lunch Period—(A) Work Day—Eight (8) hours shall constitute a day's work between the hours of 8:00 A.M. and 4:30 P.M.

(B) Lunch Period—Lunch period shall be a thirty (30) minute period between the hours of 12:00 noon and 12:30 P.M. If any employee covered by this Agreement is required to work during such lunch period, he shall be compensated at the overtime rate of pay. The provision shall in no way affect the requirements of Article V that employees working on shift work shall be paid for their lunch period.

Section 2. Show-Up Time—The following provisions shall be applicable to show-up time:

(a) An employee who is requested to report for work and is informed prior to 8:00 A.M. that he will not work that day, shall receive two (2) hours pay.

(b) An employee who is requested to report for work and is informed prior to preparation time (7:30 A.M.) that he will not work that day, shall receive two (2) hours pay.

(c) An employee who is requested to report for work and commences preparing his machine and is informed prior to 8:00 A.M. that he will not work that day, shall receive one-half (½) hour at the overtime rate for preparation time and two (2) hours pay for show-up time.

(d) An employee who is requested to report for work prior to the regular starting time (8:00 A.M.) and prior to the requested starting time is informed that he will not work that day, shall receive pay at the overtime rate for the hours prior

to the regular starting time and two (2) hours pay for show-up time.

(e) Employees who are not informed prior to the regular starting time that they will not work that day shall receive a full day's pay.

(f) Employees starting to work at 8 A.M. shall receive a Full Day's Pay.

The above provisions shall be applicable to all shift work under the terms of this Agreement.

Section 3. Shift Work—No shift work shall be established unless it is of three (3) days or more duration; otherwise, overtime shall prevail from 4:00 P.M. to 8:00 A.M. When shift work is established and work is carried on with two (2) or three (3) shifts of men working eight (8) hours each the starting time for shifts shall be 8:00 A.M. for the day shift, 4:00 P.M. for the afternoon shift, and 12:00 P.M. midnight for the night shift. Then only single time shall be paid for both night work and day work, during week days. Where shift work is performed from 12:01 A.M. Saturday to 12:00 P.M. Sunday, each shift shall be paid for at the rate of Double Time.

If however, shift work is on pumps or heaters and seven (7) day pumping or heating is necessary on the job, then each shift shall be entitled to Time and One-Half for Saturdays and Double Time for Sunday.

When pumping is required on a six (6) days basis from Monday through Saturday, inclusive, Double Time shall be paid for Saturdays: this shall also apply to any heating done with mechanical heaters.

Employees working on shift work shall be paid for their lunch period. Where only two (2) shifts are required, and the Employer wishes the starting time advanced, a representative of the Union and a representative

of the Employer shall meet and agree to the starting time for both shifts.

Section 4. Number of Men—Continuous Shift—It may be mutually agreed upon between the representative of the Company and the representative of the Union that a rotating shift of four (4) men instead of three (3) men can be used when operating on a seven (7) day per week continuous shift basis.

Section 5. Overtime—Double Time—Holidays—Double time shall be paid for work done before and after the regular working day and for Saturdays, Sundays and Holidays. The following holidays are designated as those for which Double Time Shall Be Paid: New Year's Day, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas Day. No work shall be done on Labor Day except to save life or property. Holidays falling on Sunday shall be celebrated on Monday.

Section 7. Pay Day—Employees shall be paid once each week, not later than quitting time on the regularly established pay day. If the services of an employee are no longer required, he shall be so notified and paid off before quitting time, otherwise he shall report for work and be paid as usual. Time checks payable at the office of the Employer shall be considered valid providing the employees are allowed two hours traveling time for same. If the employee is not paid promptly upon his arrival at the office, he shall remain there during working hours until paid. He shall be paid at the regular scale for the waiting time.

Section 8. (A) If working conditions warrant to change an operator from one machine to another in any day's period, the operator shall be paid at the higher rate of

pay for the Two (2) machines. Not more than one such change shall be allowed in any one day, except that the return to the original assigned machine shall not be considered a second change.

(B)—In interpreting and applying this Article, it is understood and agreed that the language therein is not in any way to be interpreted as a limitation on the amount of work any employee is required to do, but only as a limitation on the number of machines such employee can be required to operate or service.

(C)—Any employee covered by this Agreement shall not be permitted to change to a machine that another employee covered by this Agreement has been employed to operate, unless the latter has been discharged for just cause.

Section 9. Idle Time—A machine must be idle one work day before another crew can be assigned.

Section 10. Repair Work—Employees shall keep their machines in good repair and good order at all times, to such extent as lies in their power to do so.

It is understood and agreed that all repair work which can be done shall be performed by the Engineer and Oiler in charge.

Engineers shall furnish their own tools within reason.

Section 11. Duties of Oiler—It shall be the duty of the Oiler to keep the machine to which he is assigned thoroughly lubricated and reasonably clean. Maintain the machine, supply it with water, gas and oil, and assist in such work as directly affects the operation of the machine. The Oiler shall be under the technical direction of the Engineer, perform such duties as he prescribes and remain at all times in close proximity to the machine.

Article VI.

Section 1. (A)—Preparing Equipment—Engineers on all cranes up to ¾ yard capacity and engineers operating derricks or hoists of two drums or more, and engineers on cranes of 15 ton lifting capacity or under shall start One-Half (½) Hour before the regular starting time, to get the machine ready for the day's operation by oiling and greasing their equipment and shall be paid for said One-Half (½) Hour at the overtime rate.

Engineers on conveyor systems will be present and assist when the conveyor is being set up, operated and moved. Engineers will also maintain the generator running the systems.

Section 2. Machinery Operation—All Power Shovels, Back Hoes, Drag Lines, Clamshells and Cranes used in work covered by this Agreement, where such machinery is rated by the manufacturer as having a capacity of ¾ cubic yards or over, or having over 15 Ton lifting capacity, and Trenching Machines 30" or over shall require an Engineer and Oiler, regardless of motive power.

Truck Cranes rated as having a lifting capacity of 15 Tons and under shall not require an Oiler. All Truck Cranes shall require an Engineer and Oiler, except as heretofore limited.

On any machine not requiring an Oiler when a second man is used, such man shall be an employee of the bargaining unit.

Engineers on all Cranes not requiring an Oiler shall receive an additional Ten Cents (10¢) per hour over and above the regular wage scale for operating such machine. This provision shall not interfere in any way with the preparation time as provided for in the Agreement.

Section 3. Long Boom Pay—All Engineers operating cranes with booms of 90 to 149 feet, including jib, shall be

compensated an additional twenty-five ($.25) cents per hour over and above the regular wage scale for operating such crane. All Engineers operating cranes with booms of 150 feet up to 200 feet, including jib, shall be compensated an additional fifty ($.50) cents per hour over and above the regular wage scale for operating such crane. All Engineers operating cranes with booms over 200 feet, including jib, shall be compensated an additional seventy-five ($.75) cents per hour over and above the regular wage scale for operating such crane.

Section 4. Premium Pay for Operation of Crane-Mounted Earth Augers and Drill Rigs—All engineers operating Crane-Mounted Earth Augers and/or Drill Rigs on Caisson Work Only shall be compensated an additional Fifty (50¢) Cents per hour over and above the regular wage scale for operating such equipment.

Section 5. Small Equipment—An Operating Engineer servicing and maintaining the following listed Class 3 machinery—Small Air Compressors, Small Generators, Small Electric Winches, Welding Machines and Sump Pumps three inch or under—shall not be required to maintain more than a total of three (3) of such machines of the same type, except as to Small Electric Winches for which the total number maintained shall not be more than four (4), nor shall such employees be required to service and maintain more than a total of five of the above listed machines in combination. When employees of the bargaining unit are employed to service and maintain more than a total of such employees shall not be required to service and maintain mechanical heaters, five (5) such heaters. Where a member of the bargaining unit is required to service and maintain more than a total of five (5) heaters, such employee shall be compensated at the Class I rate of pay negotiated for Crane Operators in this Agreement. Assignment of such

machines shall not exceed a total of eight (8). An Engineer shall not be required on one (1) small heater of less than 250,000 B. T. U.

Section 6. Small Category Equipment Assignment, Four Hours and Under—The Employer shall have the right to assign certain work to Engineers or Oilers in respect to the following listed small Class 3 machines—small pumps three inch or under doing intermittent pumping, one welding machine or three air-cooled welding machines, small air compressors under 110 cu. ft. per minute, single light plants, and all other small equipment not to exceed a total of three such machines in any combination, provided, however, that such assignment shall not exceed four (4) hours in any one shift. In the event of such assignment, the Engineer or Oiler shall be compensated at the rate of fifty ($.50) cents per hour for the entire shift over and above the negotiated rate.

Article VII.

Section 1. Boiler Plants—All Boiler Plants used for power by the Employer for Building Construction Work shall be in charge of a Hoisting Engineer, except when Steam or power is furnished from an existing plant. None of the foregoing shall apply to steam for temporary heating purposes, except as provided by the Board of Jurisdictional Awards.

Section 2. Washing Boilers—Engineers shall wash out boilers when necessary in the opinion of the Employer and shall receive the regular scale of wages. Firemen shall be placed on boilers coming within the jurisdiction of the bargaining unit, and such Firemen shall take orders from and be responsible to the Engineer in charge of the plant. The same rules and regulations regarding overtime and working conditions which apply to Engineers shall also apply to Firemen.

Section 3. Concrete Mixer—The Employer shall not operate more than one (1) Concrete Mixer of one (1) bag capacity with side loader on the same job unless the same is operated by an employee in the bargaining unit, or any Concrete Mixer with skip hoist or side loader attached, regardless of horse power, with the exception of the 7-S size and under, unless the same is operated by an employee in the bargaining unit and all equipment so operated shall be covered by such employees.

Section 4. Hoists—Except small electric drill winches, regardless of horse power used for Hoisting Materials shall be operated by employees in the bargaining unit. Where four (4) or more of the electric winches are used on one job, an Engineer shall be employed to cover them and an additional Engineer for each four (4) thereafter.

It is understood that one (1) automatic reciprocating hoist used on buildings not over 50 feet in height above the grade line, said 50 feet to be exclusive of penthouse, parapet wall or chimney above the roof, shall not require an Engineer.

If more than one Automatic Hoist is used on the same building or a group of buildings; then one Engineer shall be employed for the first two (2) three (3), four (4) or five (5) hoists, as the case may be, and thereafter an Engineer shall be employed for each five (5) additional hoists, or portion thereof.

On all buildings over 50 feet in height, as described, an Engineer must be utilized on all Automatic Hoists.

Section 5. Employees—Horsepower Requirement—If the Employer operates more than one machine developing more than 5 HP on one job, an Engineer shall be employed, and if equipment is already on the job which is under operation and being operated by an Employee in the bar-

gaining unit, any additional piece of equipment, regardless of horsepower, shall be operated by an employee in the bargaining unit. This shall not apply to Saw Rigs, Grinding or Polishing Machines, or other equipment not normally operated by Engineers.

Article VIII.

Section 1. Wage Rates—Employers shall pay the following wage rates effective:

EQUIPMENT CATEGORY—CLASS I

	6-1-66	6-1-67	6-1-68	6-1-69
Austin Digger, etc.	$5.25	$5.45	$5.75	$6.05
Batch Plan Operator	5.25	5.45	5.75	6.05
Benoto—requires 2 Engineers	5.25	5.45	5.75	6.05
Caisson Rigs, requires Oiler	5.25	5.45	5.75	6.05
Concrete Conveyor Systems	5.25	5.45	5.75	6.05
Concrete Paver over 27 Cu. Ft. requires Oiler	5.25	5.45	5.75	6.05
Concrete Spreader	5.00	5.20	5.50	5.80
Concrete Towers	5.00	5.20	5.50	5.80
Cranes, All	5.25	5.45	5.75	6.05
Cranes, Hammerhead requires Oiler	5.25	5.45	5.75	6.05
Derricks, Two Drum and over	5.25	5.45	5.75	6.05
Derricks, Small	4.90	5.10	5.40	5.07
Dinky Locomotive	5.00	5.20	5.50	5.80
Highlift Shovels, 2½ yds. or more	5.25	5.45	5.75	6.05
Derricks, Traveling requires Oiler	5.25	5.45	5,75	6.05
Hoists, Three Drum	5.25	5.45	5.75	6.05
Craft Foreman	5.50	5.70	6.00	6.30
Assistant Craft Foreman	5.35	5.55	5.85	6.15
Mechanic	4.90	5.10	5.40	5.70
Motor Patrol	5.25	5.45	5.75	6.05
Pile Drivers & Skid Rig requires Oiler	5.25	5.45	5.75	6.05
Pump Cretes & Squeeze Cretes—Screw Type Pumps & Gypsum Bulker & Pump	5.25	5.45	5.75	6.05
Rock Drill, self propelled	5.25	5.45	5.75	6.05
Straddle Buggies	5.25	5.45	5.75	6.05
Tractor—with Boom	5.25	5.45	5.75	6.05
Trench Machines	5.25	5.45	5.75	6.05

EQUIPMENT CATEGORY—CLASS II

	6-1-66	6-1-67	6-1-68	6-1-69
Boilers	$4.70	$4.90	$5.20	$5.50
Broom, all Power Propelled	4.70	4.90	5.20	5.50
Bulldozers	4.80	5.00	5.30	5.60
Combination Backhoe & Front End Loaders	5.00	5.20	5.50	5.80
Concrete Mixer 2 bag or over	4.70	4.90	5.20	5.50
Concrete Paver, 27 cubic feet	4.90	5.10	5.40	5.70
Concrete Finish Machine	5.00	5.20	5.50	5.80
Forklift Trucks	4.80	5.00	5.30	5.60
Grader, Elevating	5.05	5.25	5.55	5.85
Grouting Machines	5.05	5.25	5.55	5.85
Highlift Shovels or Front End Loaders	4.80	5.00	5.30	5.60
Hoist, Stack	4.80	5.00	5.30	5.60
Hoists, One Drum	4.70	4.90	5.20	5.50
Hoists, Two Drum	4.85	5.05	5.35	5.65
Hoist, Elevator	4.70	4.90	5.20	5.50
Hoists, Tugger Single Drum	4.70	4.90	5.20	5.50
Hoists, Two Tugger—one floor	5.05	5.25	5.55	5.85
Post Hole Digger	5.05	5.25	5.55	5.85
Pre-Stress Machines	5.05	5.25	5.55	5.85
Roller	4.55	4.75	5.05	5.35
Greaser-Engineer	4.80	5.00	5.30	5.60
Scoops, Tractor, Drawn	4.60	4.80	5.10	5.40
Stone Crushers	4.90	5.10	5.40	5.70
Tamping Machine	4.80	5.00	5.30	5.60
Tractors	4.45	4.65	4.95	5.25
Tournapulls	4.70	4.90	5.20	5.50
Winch Trucks with "A" Frame	4.70	4.90	5.20	5.50
Winch Tractors	4.70	4.90	5.20	5.50

EQUIPMENT CATEGORY—CLASS III

	6-1-66	6-1-67	6-1-68	6-1-69
Air Compressor—small up to 110	$4.30	$4.50	$4.80	$5.10
Air Compressor—large over 110	4.55	4.75	5.05	5.35
Batch Plant—Oiler	3.85	4.05	4.35	4.65
Combination Compressor and Welding Machines	4.70	4.90	5.20	5.50
Combination small eqpt. opr.	4.70	4.90	5.20	5.50
Conveyor, Portable	4.60	4.80	5.10	5.40
Generators—Small—50KW and under	4.50	4.70	5.00	5.30
Generators—Large—over 50KW	4.50	4.70	5.00	5.30
Heaters, Mechanical	4.00	4.20	4.50	4.80
Hoists, Automatic	4.60	4.80	5.10	5.40
Oiler and Apprentice Engineer	3.85	4.05	4.35	4.65
Pumps (1 to 3) not over 300 ft. apart	4.60	4.80	5.10	5.40
Steam Generators	4.95	5.15	5.45	5.75
Welding Machines	4.55	4.75	5.05	5.35
Welding Machines—Air Cooled	4.55	4.75	5.05	5.35
Winches, 4 small electric	4.35	4.55	4.85	5.15
Pumps—Well Points	4.60	4.80	5.10	5.40

Section 2. New Equipment—It is mutually agreed between the Union and the Association to meet and agree on wage rates for all new equipment which is not listed in this Agreement that would come under the jurisdiction of the International Union of Operating Engineers.

Article IX—Fringe Benefits.

Section 1. Health and Welfare—It is understood and agreed that effective June 1, 1966 each Employer shall pay twenty ($.20) cents per hour for each hour worked by the employees covered by this Agreement to the Health and Welfare Fund, International Union of Operating Engineers, Local Nos. 150, 150A, 150B and 150C.

The Welfare Fund has been established and is to be administered in accordance with the provisions of the National Labor-Management Relations Act, as amended.

The Welfare Fund maintains a place of business at 401 N. Michigan Ave., Chicago, Illinois 60610.

Contributions of the Employer shall be forwarded to such business office together with report forms supplied for such purpose, not later than the 10th day of the following month.

If contributions of the Employer are not made by the 20th day of the month on which contribution is to be paid, the Employer shall be liable for any claim that may arise on account of such non-payment.

Section 2. Pension Fund—It is understood that effective June 1, 1966 the Employer shall pay fifteen ($.15) cents per hour for each hour worked by the employees covered by this Agreement to the Northern Illinois and Indiana Pen-

sion Fund, International Union of Operating Engineers, Local Nos. 150, 150A, 150B and 150C.

It is understood and agreed that effective June 1, 1967, each Employer shall become liable to contribute twenty ($.20) cents per hour for each hour worked by the employees covered by this Agreement to the aforesaid Pension Fund.

The Pension Fund has been established and is to be administered in accordance with the applicable provisions of the National Labor Relations Act, as amended.

The Pension Fund maintains a place of business at 401 N. Michigan Ave., Chicago, Illinois 60610.

Contributions of the Employer shall be forwarded to such business office together with report forms supplied for such purpose, not later than the 10th day of the following month.

Contributions to the aforesaid Pension Fund shall not constitute or be deemed wages to the employees.

Section 3. Vacation Fund: It is understood and agreed that effective June 1, 1967, the following provisions shall become applicable:

(a) The Employer shall pay Ten Cents (10¢) per hour for each hour worked by each employee covered by this Agreement into a Vacation Fund which shall be maintained by the Employer.

(b) The vacation contributions shall be due and payable to the employee no later than five (5) days after the anniversary date of employee's employment unless said employment is previously terminated in accordance with sub-paragraphs (c) and (d) below.

(c) If the employment of the employee is terminated by the Employer, all vacation money due said employee shall be due and payable not later than five (5) days after such termination.

(d) If an employee voluntarily terminates his employment, all vacation contributions due him shall be due and payable not later than five (5) days after such termination.

Article X.

Section 1. Savings Clause—Any provision contained herein that is contrary to or held to be in violation of the Labor Management Relations Act of 1947, or any Federal Law now in force or hereafter enacted, or hereafter becoming effective, shall be void and of no force or effect, and this contract shall be construed as if said void provision here were not a part thereof, it being intended, however, that the other provisions of this contract shall not be affected thereby.

It is further agreed that should compliance with any Federal Law, or amendment thereof, or any order or regulation issued thereunder, now or hereafter in force and effect, prohibit the carrying out of any of the provisions of this Agreement, then to the extent of such deviation or prohibition this Agreement shall be deemed to have been automatically amended, effective on the effective date of such law, order or regulation.

Such amendment to this contract shall remain in effect only so long as said law, amendment, order or regulation continues in force, or until the expiration of this Agreement, whichever event shall first occur.

In Witness Whereof, the parties have executed this Agreement the 18th day of June, 1966.

Representing The:

INTERNATIONAL UNION OF
OPERATING ENGINEERS,
LOCAL NO. 150, AFL-CIO
W. F. MARTIN, *President*
RAYMOND W. GAVIN, *Vice. Pres.*
LESTER DOOGAN, *Rec. Corr. Sec'y.*
SAMUEL D. CHRISS
A. J. MEAGHER

Representing The:

WILL COUNTY CONTRACTORS
ASSOCIATION
L. S. BROWN

CHICAGO OUTER BELT
CONTRACTORS ASSOCIATION
STANLEY H. TRYGG, *President*

FOX VALLEY GENERAL
CONTRACTORS ASSOCIATION
JAMES BANNISTER, *Executive Director*

IN THE UNITED STATES DISTRICT COURT.
• • (Caption—68-C-2091) • •

MEMORANDUM OPINION.

This is an action to compel arbitration of a labor dispute pursuant to Section 301 of the Labor Management Relations Act, 29 U. S. C. § 185(a). Presently pending before the court is the question whether the parties are bound to submit their differences to arbitration by a valid collective bargaining agreement. Evidence relative to this issue was presented at a hearing on October 24th of this year.

On May 12, 1964, plaintiff union and defendant Flair entered into a memorandum contract in which they agreed to be bound by the "master" agreement then in force between plaintiff and certain General Contractor's Associations, and by subsequent master agreements. The arbitration clause here invoked is found in the master agreement of June 1, 1966.

Defendant challenges the validity of the contract, arguing that it is void and unenforceable for "lack of mutuality." However, the memorandum agreement binds the plaintiff as well as the defendant to the terms and conditions of the master agreement. And similar "incorporating" contracts have uniformly been upheld as valid and binding. See, *e.g.*, *Schlecht* v. *Hiatt*, 271 F. Supp. 644 (D. Ore. 1967); *Line Drivers Local* v. *W. J. Digby, Inc.*, 218 F. Supp. 519 (D. Col. 1963); *cf. Thorn Construction Co.* v. *International Hod Carriers*, 75 Nev. 420 (1959).[1]

1. *Ketcher* v. *Sheet Metal Workers International Association*, 115 F. Supp. 802 (E. D. Ark. 1953), and *Teamsters Local 839* v. *Morrison-Knudsen Co.*, 270 F. 2d 530 (9th Cir. 1959), relied on by defendant, are not in point for they did not involve contracts personally entered into by the employer.

Accordingly, I have determined that defendant was bound by the memorandum agreement to arbitrate labor disputes within the limits of the arbitration clause.

The question remains, however, whether the union has been guilty of laches so as to bar it from enforcement of the arbitration clause.[2] Its complaint seeks to arbitrate its charges that Flair has been in continuous breach of the agreement since June 1, 1966 by its refusal to hire through the union office, pay union wages, or contribute to union funds.

The master agreement contemplates initiation of arbitration proceedings if any dispute is not settled within 48 hours of its occurrence, and further provides that the Board of Arbitrators shall meet "within six (6) days." Yet demand for arbitration was not made in this case until April, 1969, almost five years from Flair's first alleged failure to comply with the contract and nearly three years from the inception of the alleged breach sought to be arbitrated. At the hearing, Robert Richards, the president of Flair, testified that he had no contact whatsoever with the union from the signing of the memorandum contract in 1964 until the summer of 1968, nor did he receive a copy of the 1966 master contract. Furthermore, his only employee within the jurisdiction of plaintiff union quit within a month of the execution of the 1964 agreement; conse-

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2. Although "procedural" questions are to be determined by the arbitrator rather than by the court, *John Wiley & Sons* v. *Livingston*, 376 U. S. 543, 557 (1964), the issue of laches with regard to an arbitration demand is independent of the bargaining contract and therefore properly determined by the court. *Amalgamated Clothing Workers* v. *Ironall Factories Co.*, 386 F. 2d 586, 591 (6th Cir. 1967); *International Ass'n. of Machinists* v. *Hayes Corporation*, 296 F. 2d 238, 244 (5th Cir. 1961); *cf. Reconstruction Finance Corp.* v. *Harrisons & Crosfield*, 204 F. 2d 366, 369 (2d Cir. 1953).

quently, Flair considered the contract to have been abandoned.

The plaintiff's business agent, Ambrose Meagher, conceded that he had no contact with Flair in 1965 or 1966, but contended that he had some discussions with Richards in 1964, 1967 and 1968. Cross examination revealed inconsistencies, however, between his direct testimony and prior deposition testimony regarding his 1967 visits to the job site, and I find Richards to be the more credible witness.

To require Flair to respond, through arbitration, to general charges of noncompliance with contract provisions allegedly beginning more than two years before this suit was filed would impose an extreme burden on its defense efforts. Especially is this so when, as demonstrated at the hearing, Flair understandably considered the contract to have been abandoned soon after its inception. Plaintiff has offered no explanation for its delay in enforcement; yet to compel arbitration would reward plaintiff for its own inaction and subject defendant to the risk of liability because of actions taken or not taken in reliance on plaintiff's apparent abandonment. *Cf. Amalgamated Clothing Workers v. Ironwall Factories, Co., supra,* at 592.

Because plaintiff has been guilty of laches by its unjustified delay in the enforcement of its contract with defendant, an order has been entered today dismissing the complaint.

Enter:

BERNARD M. DECKER,
United States District Judge.

Dated: December 4, 1969.

IN THE UNITED STATES DISTRICT COURT.
(Caption—68-C-2091)

NOTICE OF APPEAL

DEFREES, FISKE VOLAND ALBERTS & HOFFMAN,
EDWARD J. GRIFFIN, ESQ.,
105 South LaSalle Street,
Chicago, Illinois,

MURPHY & GRIFFIN,
J. ROBERT MURPHY, ESQ.,
340 North Lake Street,
Aurora, Illinois 60560,
Attorneys for Defendants.

Notice is hereby given that the Plaintiff, International Union of Operating Engineers, Local 150, AFL-CIO, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order entered on December 5, 1969, by the Honorable Judge Bernard M. Decker dismissing the Plaintiff's First Amended Complaint.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO,

by: .....

by: .....

Attorneys for Plaintiff.

SHULMAN & BAUM,
29 South LaSalle Street,
Suite 350,
Chicago, Illinois 60603,
236-4316.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit

September Term, 1970 September Session, 1970

No. 18334

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO,
Plaintiff-Appellant,

v.

FLAIR BUILDERS, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

February 5, 1971

Before SWYGERT, *Chief Judge,* DUFFY, *Senior Circuit Judge,* and STEVENS, *Circuit Judge.*

SWYGERT, *Chief Judge.* The primary question in this appeal is whether a court may properly dismiss the complaint on the basis of laches resulting from dilatory notification of the existence of a dispute in a suit brought to compel arbitration with regard to the dispute.

This action was brought in November 1968 by the International Union of Operating Engineers, Local 150, AFL-CIO, under section 301 of the Labor Management Relations Act of 1947, 29 U. S. C. § 185(a), against Flair Builders, Inc., a construction company located in Sugar Grove, Illinois.

Initially, the union sought specific performance of an alleged bargaining agreement between the parties. Upon

Flair's motion the district court dismissed the complaint for failure to state a claim. At the time of the dismissal the district judge, having observed that an "additional issue" had been suggested by the parties namely, whether a "memorandum agreement" executed by the parties constituted a binding collective bargaining agreement, suggested that this issue be submitted to arbitration. Thereafter, the union demanded arbitration of the "the issues pending before the court concerning the applicability of the contract and the subsequent issues of possible violations." After Flair refused to arbitrate, the union filed an amended complaint seeking to compel arbitration.

The company filed a motion to dismiss the amended complaint, contending that the action was barred by laches. The motion was denied, and the cause was set for an evidentiary hearing to determine which issues, if any, the employer agreed to arbitrate. After hearing evidence, the court filed its order and memorandum opinion dismissing the action. A summary of the evidence submitted to the district court follows.

The union represents laborers who operate heavy equipment, such as cranes, in the construction industry and negotiates master collective bargaining agreements with contractor associations in various parts of Illinois. The union also negotiates individual memoranda of agreement with contractors who are not members of the contractor associations, such as Flair. These memoranda adopt and bind the nonmember contractor to the terms of the master agreements.

On June 1, 1963, the union entered into a master agreement with a number of contractor associations in northern Illinois. This agreement terminated on May 31, 1966. On May 12, 1964, the union and Flair signed a memorandum of agreement which specifically adopted the terms of the then existing master agreement. Flair also agreed to adopt

any additional master agreements entered into between the union and the contractor associations.

At the time of execution of the memorandum in 1964, the company had one employee covered by the agreement. Upon the insistence of the union this employee joined the union, but left his employment about two weeks later. Other nonunion employees continued from time to time to operate Flair's single piece of equipment. In 1965 the company added a second piece of heavy equipment, in 1966 a third, and in 1967 a fourth, all of which were operated by company employees who were nonunion. Yet during all this period of time, from May 1964 until the summer of 1968, the company was not contacted by the union.

In the meantime, in 1966, the union and the contractor associations entered into a new master agreement which contained a stipulation that "should any difference arise between the parties hereto which cannot be settled by their representatives, within 48 hours of the occurrence, such difference shall be submitted to arbitration." It was further stipulated that the arbitrators should meet within six days after it was determined that the dispute could not be settled.

In June 1968, the union business agent visited the company's job site and discovered a nonunion employee operating a piece of equipment. Shortly thereafter, the employee joined the union; however, the company refused to pay the union's wage scale.[1] Subsequently the union filed the instant suit.

1. In the fall of 1968, the union filed a complaint with the Wage and Hour Division of the Department of Labor on behalf of the employee for back wages. After the complaint was sustained, the employee was discharged. Thereupon an unfair labor practice charge was filed with the National Labor Relations Board. As part of a settlement agreement between the Board and the company, the employee received back pay and was offered reinstatement.

In dismissnig the action the district court ruled that the union had been guilty of laches by its unjustified delay in the enforcement of its contract with the company. In the course of his memorandum opinion the district judge said:

> To require Flair to respond, through arbitration, to general charges of noncompliance with contract provisions allegedly beginning more than two years before this suit was filed would impose an extreme burden on its defense efforts. Especially is this so when, as demonstrated at the hearing, Flair understandably considered the contract to have been abandoned soon after its inception. Plaintiff has offered no explanation for its delay in enforcement; yet to compel arbitration would reward plaintiff for its own inaction and subject defendant to the risk of liability because of actions taken or not taken in reliance on plaintiff's apparent abandonment.

The district judge also found that there had been no contact whatsoever between the union and Flair from the date of the signing of the memorandum of agreement in 1964 until the summer of 1968. This determination was made after the district judge had heard conflicting testimony and concluded that the testimony of Flair's witness was more credible than that of the union's business agent because of inconsistencies in the latter's testimony. Such findings of fact based on the credibility of witnesses are entitled to great weight on review. The record reveals no justification for overturning the trial court's findings. Moreover, when the trial judge requested that "the [union] by letter to this court within ten days should specify in some detail what violations of the purported agreement it seeks to arbitrate, and the time of their occurrence . . . ," the union's response was devoid of specificity and amounted to nothing more than the concluding statement of its letter that it sought "to arbi-

trate the total violation of the entire agreement in question since . . . June 1, 1966."

The factual context of this appeal thus narrows the issue before us to the question of whether a party to a collective bargaining agreement which contains an arbitration clause may be so dilatory in making the existence of vaguely delineated disputes known to the other party that a court is justified in refusing to compel the submission of such disputes to arbitration. The district court found for Flair and dismissed the complaint on the ground of laches. We affirm.

The union contends that the question of whether its dilatory notification of the existence of a dispute should operate to bar this suit to force the employer to arbitration is a question of procedural timeliness which courts are required to leave to the arbitrator for determination pursuant to the Supreme Court's decision in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543. (1964). We find the characterization of such delay as "procedural untimeliness" inappropriate.

The procrustean reading of *Wiley* urged by the union is unsupported by the language of the opinion, and we are convinced that nothing said in *Wiley* forecloses judicial determination that a dispute is so stale before its announcement that courts should decline to compel its submission to arbitration.

Wiley arose out of the refusal by the surviving corporation of a corporate merger to submit to arbitration a dispute between it and a union which had executed a collective bargaining agreement including an arbitration clause with another corporation which did not survive the merger. As Mr. Justive Harlan noted in the opinion of the Court, the major questions presented in *Wiley* were:

(1) whether a corporate employer must arbitrate

> with a union under a bargaining agreement between the union and another corporation which has merged with the employer, and, if so, (2) whether the courts or the arbitrator is the appropriate body to decide whether *procedural prerequisites which, under the bargaining agreement, condition the duty to arbitrate* have been met. 376 U. S. at 544 (emphasis added).

It is thus apparent that, to the extent *Wiley* was concerned with the issue of timeliness of a demand for arbitration, it dealt only with who must decide whether arbitration is barred by untimeliness in the satisfaction of some procedural prerequisite to arbitration deriving from the dictates of the grievance process itself. This conclusion is amply supported by other language in the opinion. For example, the Court stated:

> [W]e do not rule out the possibility that a union might abandon its right to arbitration by failing to make its claims known. . . . The Union made its position known well before the merger and never departed from it. 376 U. S. at 551.

We therefore conclude that *Wiley* determined only that the effect of *intrinsic* untimeliness relating to whether the dictates of a prescribed process for the resolution of union-employer disagreements have been satisfied must be determined by the arbitrator. But that is not the form of delay presently before us. The delay of the union in this case is more appropriately described as *extrinsic* untimeliness in that it does not raise any question of whether prescribed procedures for the resolution of disputes have been satisfied but rather requires the determination of whether delay in the mere notification of the existence of a dispute has prejudiced the ability of the employer to respond without regard to whether procedural prerequisites to arbitration have been followed. As another circuit has observed in a similar case:

> In deciding whether the union, in this case, is barred from prosecuting its cause of action because of laches, we are not indulging in the judicially unwarranted task of interpreting the collective bargaining agreement. Laches is independent of any procedure established by the collective bargaining agreement and a decision on laches adds or subtracts nothing from the meaning of the agreement. Furthermore, consideration of the issue in no way involves a consideration of the merits of the underlying substantive issue. . . . The union first gave notice of the existence of a dispute . . . more than one year after the dispute arose. . . . Failure to give notice and request arbitration until such a late date would present serious impediments to [the employer] in making an effective defense. *Amalgamated Clothing Workers* v. *Ironall Factories Co.*, 386 F. 2d 586, 591-92 (6th Cir. 1967).

In the instant case, the union is seeking to compel arbitration of an amorphous dispute as to general noncompliance with the provisions of a collective bargaining agreement. Assuming, *arguendo,* that notice of a dispute is effectively given when stated with as little specificity as here, we note that the district court determined from the testimony of conflicting witnesses that there was no contact whatever between the employer and the union from the effective date of the June 1, 1966 master agreement until the summer of 1968. From this, the district court determined that the union's suit to compel arbitration was barred by laches. We find no error in that determination.

The judgment of the district court is affirmed.

STEVENS, *Circuit Judge*, dissenting. This litigation arises out of a collective bargaining agreement which Flair executed in 1964 and which was still in effect when the union filed its complaint in 1968. The union asserts that Flair failed to pay the agreed wages to one employee in 1964, hired nonunion employees in 1965, 1966, and 1967, and generally refused to follow contract procedures for hiring personnel and contributing to a pension fund. The employer defended on the ground that the contract had been abandoned by the union and, therefore, was no longer in effect. The trial court rejected the abandonment defense but held that the union was guilty of laches.

The appropriateness of laches as a defense to a labor dispute involves a consideration of several questions which can best be answered by one who is familiar with the collective bargaining relationship between the parties. Although the trial court stated that the defense of the union's charges would impose an "extreme burden" on Flair, the record does not answer these questions: Does the area-wide master agreement contemplate that a small employer like Flair shall have the burden of full compliance with its terms? Would routine records ordinarily retained by employers disclose the information on which Flair relies to justify its disregard of its written undertakings? Was the lack of communication between the union and Flair entirely the fault of the union? Even if it was too late in 1968 for the union to question Flair's breaches in 1964 and 1965, was it also too late to ask a neutral third party to pass judgment on 1966 and 1967 breaches, as well as a continuing refusal to abide by the agreement?

The task of answering questions such as these — determining whether the union's delay was unreasonable and whether Flair's defense has been significantly prej-

udiced by that delay — inevitably involves a consideration of the merits of the underlying dispute between the parties. This task should, therefore, be performed by the arbiter who is also responsible for deciding the merits of the basic controversy.

Considerations affecting the orderly disposition of litigation, as well as a due regard for our national labor policy, persuade me that the defense of laches should be processed like other "procedural" questions which grow out of the dispute and bear on its final disposition. See *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 556-559; *Local Union No. 51, International Brotherhood of Electrical Workers, AFL-CIO* v. *Illinois Power Company*, 357 F. 2d 916, 918-919 (7th Cir. 1966). Separating laches from the merits for trial before a separate tribunal will frequently result in an unnecessary duplication of effort and may commit the disposition of the laches issue to the tribunal which is less qualified to evaluate it fairly in the context of the collective bargaining relationship. Moreover, even in those cases which are promptly terminated by judicial approval of the defense, the price for efficiency will be some loss of union confidence in the fairness of the procedures which are offered as a substitute for collective self-help. Unless arbitration procedures command labor's respect, less civilized methods of resolving disputes will be employed with greater frequency.

In many collective bargaining agreements the employer has obtained a "no strike" pledge from the union in exchange for a commitment to arbitrate disputes. Unions must honor that bargain. *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U. S. 235. We should compel employers to honor their *quid pro quo*. I would reverse.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604.

Monday, April 12, 1971.

Before

HON. LUTHER M. SWYGERT, *Chief Judge*
HON. F. RYAN DUFFY, SR. *Circuit Judge*
HON. JOHN PAUL STEVENS, *Circuit Judge*

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO,
Plaintiff-Appellant,

vs.

No. 18334

FLAIR BUILDERS,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for rehearing filed in the above-entitled cause be and the same is hereby denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-41

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO,
Petitioner,

vs.

FLAIR BUILDERS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. .....

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO,

Petitioner,

vs.

FLAIR BUILDERS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

International Union of Operating Engineers, Local 150, AFL-CIO (hereinafter referred to as "Petitioner"), prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on February 5, 1971.

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Appeals is recorded at 440 F. 2d 557 (7th Cir. 1971) and is presented in its entirety in Appendix A herein, *infra* (pages A1 through A9). The Memorandum of Opinion of the District Court is reported at ..... F. Supp. ..... and is printed in its entirety in Appendix B hereto, *infra* (pages A10 through A12).

JURISDICTION.

The judgment of the Court of Appeals, appearing in Appendix A hereto, *infra*, was entered on February 5, 1971. Re-hearing was denied on April 12, 1971. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTION PRESENTED.

Once a federal court has determined that a dispute is arbitrable under a collective bargaining agreement, must questions of delay in seeking arbitration such as laches be decided by an arbitrator rather than the federal court?

STATUTE INVOLVED.

The statute involved herein is the Labor-Management Relations Act, 1947, Title III, § 301, 61 Stat. 156, 29 U. S. C. 185(a), as amended. The language of the aforementioned statutory provision is set forth and printed in Appendix C, *infra*, at page A13.

STATEMENT.

Nature of the Case.

The Petitioner initially brought suit in Federal District Court seeking enforcement of its collective bargaining agreement to which the Petitioner and the Respondent were parties. The action was brought pursuant to § 301 of the Labor-Management Relations Act of 1947, as amended.

In dismissing the initial complaint (App. 7-11, 12-14), the District Court stated that the primary dispute between the parties—whether they were bound to the collective bargaining agreement—should be submitted to arbitration (App. 14).[1]

Thereafter, the Petitioner demanded arbitration which demand was refused by the Respondent (App. 18-19, 22, 29).

Accordingly, the Petitioner then filed an amended complaint requesting the enforcement of its demand for arbitration (App. 16-19). The Respondent thereafter filed a motion to dismiss alleging that the Petitioner was guilty of laches in bringing said dispute to arbitration (App. 23-24). The District Court, in denying the motion to dismiss, held that laches is a procedural question which should be decided by an arbitrator and not by the federal court (App. 26). In addition, the Court ordered a hearing for the *limited purpose* of determining whether the parties had entered into a binding collective bargaining agreement (App. 27).

The hearing was held on October 24, 1969. The District Court held that the Respondent was bound by the collective

1. The printed Appendix filed with the Court of Appeals has been submitted herewith. References to same will appear as "App."

bargaining agreement and accordingly was required to arbitrate the dispute (App. 150). However, notwithstanding the limited scope of the hearing and its prior holding that the issue of laches is a procedural question which must be decided by an arbitrator, the District Court, nevertheless, determined the issue of laches, found the Petitioner guilty of laches and dismissed the amended complaint (App. 151).

The Seventh Circuit subsequently affirmed the decision of the District Court in a 2-1 decision, Judge Stevens, dissenting (Appendix A, this Brief, pages A1-A9).

The Facts: Collective Bargaining History.

The Petitioner negotiates master collective bargaining agreements with several contractor associations in the State of Illinois (App. 48, 56, 103, 124). In addition, the Petitioner enters into individual memoranda of agreement with contractors who are not members of the contractor associations (App. 49, 55, 122-123). Such a memorandum specifically adopts and binds the Petitioner and the non-member contractor to the terms and conditions of the master agreement (App. 122).

On June 1, 1963, the Petitioner entered into a master collective bargaining agreement (hereinafter referred to as the "Master Agreement"), with various contractor associations covering building construction in Will, Kendall, Grundy, Kane, and Kankakee Counties, Illinois (App. 48-49, 103). Thereafter, on May 12, 1964, the Petitioner and the Respondent, who was not a member of any of these contractor associations, executed a memorandum of agreement (hereinafter referred to as the "Memorandum") (App. 46-47, 49-50, 73, 85, 122). This Memorandum specifically adopted and bound the Respondent to the terms

and conditions of the aforementioned existing Master Agreement (App. 122). In addition, under the terms of the Memorandum, the Respondent agreed to adopt any additional Master Agreements entered into by the Petitioner and the Fox Valley Contractors Association, one of the signatory contractor associations to the Master Agreement (App. 55, 122).

Union Relations With the Company 1964-1966.

At the time the Memorandum was executed by the parties, the Respondent employed one Jerry Rumsey, to operate equipment covered by the Master Agreement (App. 44-45, 84, 86). Rumsey became a member of the union on the same day the Memorandum was signed (App. 45, 47, 73, 85). Thereafter, the Petitioner's business agent, Ambrose Meagher, received a number of complaints from Rumsey that he was not being paid the wage scale set forth in the Master Agreement (App. 50). Meagher went out to the Respondent's job site a number of times to investigate the complaints and advised Robert V. Richards, the Respondent's president, to pay the correct wage scale (App. 50-51). However, Richards refused to pay the appropriate wage scale and even admitted that he was paying wages which were less than those required by the Master Agreement (App. 50-52, 100). After these numerous attempts to secure his correct wages, Rumsey quit (App. 52, 66, 86-87). Meagher made one more attempt to obtain the full wages for Rumsey after the latter had quit; however, Richards refused to pay same and Rumsey decided not to press the issue any further (App. 52).[2]

2. While Richards admitted that he had not paid the correct wage scale since he had advanced Rumsey's initiation fee and was deducting the fee from Rumsey's wages, he denied having conversations with Meagher about it either while Rumsey was on the job or after he had quit. (App. 50-52, 86-88, 99-100.)

After Rumsey quit, the Respondent subcontracted certain excavating work to another employer (App. 53, 88-89). During the summer of 1964, it was undisputed that Meagher visited the job site several times and observed this subcontractor performing the excavating work and had some conversations with him (App. 53). Accordingly, the Petitioner had no complaints in regard to its Agreement with the Respondent during this period since the excavating work covered by that Agreement was being performed by the subcontractor and not by the Respondent (App. 53).

1965-1966.

In 1965 and 1966 the Petitioner's business representative, Meagher, again made a number of visits to the Respondent's construction site (App. 53-54). He observed the subcontractor performing excavation work and had various conversations with him and accordingly had no contract disputes with the Respondent (App. 53-55, 91, 95, 98-99).[3]

The New Master Collective Bargaining Agreement—1966.

On June 1, 1966, the Petitioner and the aforementioned contractor associations entered into a new master collective bargaining agreement (hereinafter referred to as the "New Master Agreement") (App. 55-56, 124). Under the terms of the existing Memorandum and specifically paragraph 3 therein, the Petitioner and the Respondent had agreed to adopt the terms and conditions of any new master

3. Richards testified that during 1965 some of his non-union employees operated equipment which came within the scope of the Master Agreement (App. 88-89). However, there was no evidence in the record that either the Petitioner or its business agent, Meagher, ever had knowledge of this fact.

agreement entered into between the Petitioner and the Fox Valley Contractors Association unless either party gave notice of termination (App. 122, ¶ 3). In order to terminate the Memorandum either party was required to give notice of termination at least three calendar months prior to the expiration of the existing master agreement (App. 122-123).

Neither party gave notice of termination and accordingly, on June 1, 1966, the parties adopted the terms and conditions of the new Master Agreement (App. 122).[4]

During the winter of 1966-1967, Meagher visited the construction site on numerous occasions and observed that the job had been shut down due to inclement weather (App. 57, 89-90).

Union Relations with the Company—1967-1968.

1967—The Respondent's Attempt to Avoid the Union's Security Provision as Well as the Entire New Master Agreement.

In the Spring of 1967, Meagher received a complaint that a non-union man was operating equipment on the Respondent's construction site. Meagher investigated the complaint, spoke with the non-union employee and told Richards that the employee was required to join the Petitioner pursuant to the union security provision of the New Master Agreement (App. 57-58, 68, 69-70). However, Richards refused to cooperate (App. 58).

4. It was undisputed that the general business practice of the Petitioner was to mail a copy of the new master agreements to every contractor who had signed a memorandum and who had not submitted a notice of termination of same (App. 57). Richards testified that he did not receive a copy of the new Master Agreement (App. 110); however, Meagher testified that the Petitioner utilized this standard procedure in this case (App. 66).

Thereafter, Meagher visited the job site on several occasions and each time he observed a different non-union employee operating equipment (App. 59-60, 68-69, 99). Meagher contacted Richards each time and explained that employees covered by the New Master Agreement were required to join the Petitioner; however, Richards refused to comply with the terms of the New Master Agreement (App. 59-60).[5]

Finally, in the Fall of 1967, Meagher again warned Richards that he was required to live up to the terms of the New Master Agreement, and Richards replied that he was never going to abide by the New Master Agreement and threatened to have Meagher arrested (App. 60).[6]

During the winter of 1967-1968 Meagher visited the job site a few times and observed no activity on the site (App. 60).

1968.

In June, 1968, Meagher visited the job site and discovered another non-union employee, one Floyd Schimmelpfennig, operating equipment (App. 61, 69). Meagher and

5. The union security provision of the New Master Agreement provided that an employee is required to join the union after the 7th but not later than the 10th day of employment (App. 127-128). Since the Respondent utilized a constant flow of new employees on the same equipment, it successfully avoided the impact of the union security provision. In this regard Richards even admitted that during 1967 he shuffled different employees back and forth on his various pieces of equipment (App. 99). However, Richards again denied having contact with anyone from the Petitioner during 1967 (App. 95-99).

6. In addition to Richards, the Respondent called Richards' brother, Thomas Stanley Richards, a foreman for the company, as a witness (App. 78). Initially, the foreman attempted to convey the impression that no one from the Petitioner had visited the Respondent's job site prior to 1969 (App. 79-80). However, when pressed on cross-examination, this witness admitted that he was not always on the job site and further that representatives of the Petitioner might have visited the Respondent's office which was located off the job site (App. 81-82).

Schimmelpfennig had a conversation, the result of which was that the latter decided to join the Petitioner (App. 61-62, 70-71). Shortly thereafter, in July, Schimmelpfennig joined the Petitioner and Meagher went to the job site and told Richards he would have to abide by the terms of the New Master Agreement in regard to Schimmelpfennig's employment (App. 62, 95). Richards flatly refused to abide by the New Master Agreement, stated that he did not believe in the Petitioner and was not going to pay the union wage scale (App. 62, 95). Schimmelpfennig did not receive the union scale and accordingly, a week later Meagher and William Anderson, another business representative of the Petitioner, visited the job site and demanded that Richards pay the correct wages (App. 63, 76-77, 95-96, 99). Richards again refused to pay the wages in accordance with the scale set forth in the New Master Agreement (App. 63, 76).

Thereafter, Meagher visited the job site several times during that summer and after receiving the same responses from Richards, the Petitioner filed suit to enforce its collective bargaining agreement (App. 63-64).

In addition, the Petitioner filed a charge with the National Labor Relations Board and a complaint with the United States Department of Labor (App. 64).[7]

---

7. In this regard, the Petitioner filed a complaint with the Wage and Hour Division of the Department of Labor on behalf of Schimmelpfennig for back wages (App. 64). The wage and hour complaint was substantiated in favor of Schimmelpfennig (App. 64). Thereafter, the Respondent discharged Schimmelpfennig and an unfair labor practice charge was filed against the Respondent with the National Labor Relations Board (App. 64). As a result of the filing of said charge, Schimmelpfennig received back pay and was offered reinstatement as part of a settlement agreement between the Labor Board and the Respondent (App. 64).

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION OF THE COURT BELOW IS IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT WHICH HOLD THAT ONCE A FEDERAL COURT DETERMINES THAT A DISPUTE IS ARBITRABLE UNDER THE TERMS OF A COLLECTIVE BARGAINING AGREEMENT, THE ISSUE OF DELAY IN SEEKING ARBITRATION IS FOR AN ARBITRATOR AND NOT THE FEDERAL COURT.

This Court has fashioned a federal common labor law which limits the role of the federal court and concurrently expands the role of arbitration in labor disputes. More specifically, a federal court is confined to ascertaining whether the dispute is arbitrable under the terms of the collective bargaining agreement. *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957); *Steelworkers Trilogy*,[8] *John Wiley & Sons* v. *Livingston*, 376 U. S. 543 (1964). Once it is determined that the agreement requires the parties to arbitrate their dispute, the role of the federal court is terminated. *Wiley, supra.*

Perhaps the most significant language enunciated by this Court in the *Steelworkers Trilogy, supra*, with regard to the role of the federal court in determining arbitrability is as follows:

> . . . The function of the court is *very limited* when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to *ascertaining whether the party seeking arbitration is*

8. *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

> *making a claim which on it face is governed by the contract.* Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for. (363 U. S. at 567-568) (Emphasis supplied.)

Indeed, this Court has most recently reaffirmed the federal policy favoring arbitration in *The Boys Markets, Inc.* v. *Retail Clerks Union, Local 770,* 398 U. S. 235 (1970).

In light of the above, once the lower court determined that the instant dispute was arbitrable, was there then any basis for the lower court's expanding its judicial inquiry and determining the issue of delay in seeking arbitration?[9]

The answer to this question was provided by this Court in *Wiley, supra.* In that case, as in the instant matter, the company rejected the very existence of the collective bargaining agreement, and the union, as herein, did not resort to any grievance procedure but filed suit seeking arbitration. The company then raised the defense of delay in seeking arbitration, and this Court held that that specific question must be decided by an arbitrator and not the federal court as follows:

> *Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator* . . . (376 U. S. at 557) (Emphasis supplied.)

However, the Majority opinion in the Court below held that a federal court can go beyond determining the issue of arbitrability and decide a defense relating to delay in

9. It is to be noted that the isuse of arbitrability was not raised by the Respondent in the Court of Appeals.

seeking arbitration—laches (App. A, This Brief, page A1). In taking this position, the Majority made no mention and accordingly gave no consideration to the landmark decisions of this Court limiting the role of the federal courts in *Textile Workers, supra; Steelworkers Trilogy, supra;* and *The Boys Markets, supra.* The only Supreme Court decision to which the Majority below addressed itself was *Wiley, supra.* However, in doing so, the Majority cited *Wiley* as holding that only questions involving the technical compliance with the time limitations of a grievance procedure may be submitted to an arbitrator, and that questions of delay in seeking arbitration such as laches may be determined by a federal court.

However, this was not the holding in *Wiley. Wiley* clearly demonstrates that the union therein *never* resorted to any grievance procedure but instead sought arbitration in federal court. Accordingly, the issue of delay in *Wiley* bore no relationship to the technical compliance with the time limitations of a grievance procedure, but rather related to whether the union was guilty of delay in seeking arbitration in federal court. That is the same factual issue which was before the Court below in the instant matter. Accordingly, the Majority's citing of *Wiley* to support its decision is, to utilize the language of the Majority below, a "procrustean reading of *Wiley.*"

In addition, the Majority's holding is totally inconsistent with the reasoning set forth by this Court for limiting the role of federal courts. In *Wiley,* this Court pointed out that questions of delay in seeking arbitration cannot be answered without a consideration of the merits of the dispute. As this Court stated:

> Doubt whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or *whether the*

> *unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration* . . . (376 U. S. at 557) (Emphasis supplied.)

Accordingly, this Court held that once arbitrability is determined, questions of delay are then for the arbitrator and not the federal court.

However, the Majority below disregarded *Wiley,* went beyond the issue of arbitrability and delved into the merits of the case in order to determine the question of laches. In deciding the question of laches, the Majority characterized the dispute as "amorphous" and "vaguely delineated," and made factual determinations relating to the conduct of the parties during the entire dispute. It based these determinations upon a record which the District Court had deliberately *limited* to the sole question of whether the parties were bound to the collective bargaining agreement (App. B, This Brief, page A10). Accordingly, the Majority below made its determination *on the merits,* based upon a record which did not disclose all of the evidence and thereby raised numerous factual questions which remained unanswered.

This is precisely the point raised by the Dissent below as follows:

> The appropriateness of laches as a defense to a labor dispute involves a consideration of several questions which can best be answered by one who is familiar with the collective bargaining relationship between the parties. Although the trial court stated that the defense of the union's charges would impose an "extreme burden" on Flair, the record does not answer these questions: Does the area-wide master agreement contemplate that a small employer like Flair shall have the burden of full compliance with its

terms? Would routine records ordinarily retained by employers disclose the information on which Flair relies to justify its disregard of its written undertakings? Was the lack of communication between the union and Flair entirely the fault of the union? Even if it was too late in 1968 for the union to question Flair's breaches in 1964 and 1965, was it also too late to ask a neutral third party to pass judgment on 1966 and 1967 breaches, as well as a continuing refusal to abide by the agreement?

The task of answering questions such as these—determining whether the union's delay was unreasonable and whether Flair's defense has been significantly prejudiced by that delay—inevitably involves a consideration of the merits of the underlying dispute between the parties. This task should, therefore, be performed by the arbiter who is also responsible for deciding the merits of the basic controversy. (App. A, This Brief, pages A8-9) (Emphasis supplied.)

Accordingly, the decision of the Majority below clearly illustrates the wisdom of *Wiley* in limiting the role of the federal court to determining arbitrability and referring other questions such as delay in seeking arbitration to the arbitrator.

Moreover, this Court in *Wiley* cited additional reasons for reserving the determination of laches for an arbitrator rather than a federal court. This Court pointed out that permitting a federal court to determine the question of delay will not only result in prolonged delay but also unnecessary duplication of effort. For example, a union or an employer can refuse to arbitrate a dispute, compel the other party to seek enforcement of their arbitration clause in federal court, and then raise the defense of laches which would result in lengthy and expensive litigation including the right of appeal on the delay issue alone. Moreover, even if the federal court ordered arbitration, the issue of

laches may again be raised in arbitration. As this Court stated in *Wiley*:

> . . . Reservation of "procedural" issues for the courts would thus not only create the difficult task of separating related issues, but *would also produce frequent duplication of effort* . . . (376 U. S. at 558) (Emphasis supplied.)
>
> * * * * *
>
> While the courts have the task of determining "substantive arbitrability," there will be cases in which arbitrability of the subject matter is unquestioned but a dispute arises over the procedures to be followed. In all of such cases, acceptance of Wiley's (Defendant's) position *would produce the delay attendant upon judicial proceedings preliminary to arbitration.* As this case, commenced in January 1962 and not yet committed to arbitration, well illustrates, *such delay may entirely eliminate the prospect of a speedy arbitrated settlement of the dispute, to the disadvantage of the parties (who, in addition, will have to bear increased costs) and contrary to the aims of national labor policy* (376 U. S. at 558). (Emphasis supplied.)

This teaching of *Wiley* was further pointed out by the Dissent below as follows:

> . . . Separating laches from the merits for trial before a separate tribunal will frequently result in an unnecessary duplication of effort and may commit the disposition of the laches issue to the tribunal which is less qualified to evaluate it fairly in the context of the collective bargaining relationship . . . (App. A, This Brief, page A9).

In this regard, the instant matter was initiated almost three years ago, but could have been resolved long ago in arbitration had the defense of laches not been heard by the District Court. Furthermore, lengthy delays must result since there are no precise benchmarks for determining

laches and each case will have to be decided upon its own facts.

In addition, it is submitted that if a federal court is allowed to consider laches in determining arbitrability, a veritable Pandora's Box will be opened since defendants will then be able to raise other affirmative defenses allowed under Rule 8(c) of the Federal Rules of Civil Procedure such as waiver, duress, and estoppel. Accordingly, the process of labor arbitration will become a languid and inefficient method for resolving labor disputes and its hallmark will be delay and duplication rather than efficiency and effectiveness.

Finally, from a union's point of view, the consideration for giving up its right to strike is the agreement to arbitrate labor disputes speedily and efficiently. As this Court pointed out in *Textile Workers, supra:*

> Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation (Section 301) does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way. (353 U. S. at 455)

Once the availability of *immediate* arbitration is removed from the context of a labor dispute, the consideration for maintaining industrial peace is effectively eliminated. Accordingly, it is submitted that a party who is subjected to extensive litigation over the determination of delay questions such as laches may well resort to an alternative in the form of self-help—a strike or a lockout—to resolve the dispute. Obviously, this is precisely the consequence which this Court has steadfastly sought to avoid in its development of federal labor policy from *Textile Workers,*

supra, to its most recent decision in *The Boy's Markets, supra.* See also Dissent below (App. A, This Brief, page A8).

Suffice it to say, the opinion of the Majority below is contrary to the applicable decisions of this Court.

II.

THE INSTANT HOLDING IS IN DIRECT CONFLICT WITH OPINIONS OF THE FEDERAL COURTS OF APPEALS.

As noted above, the decision of the Majority below is in direct conflict with the decisions of this Court establishing federal labor law in the area of arbitration. *Textile Workers, supra; Steelworkers Trilogy, supra; Wiley, supra; The Boy's Markets, supra.*

In addition, the opinion of the Majority below is in conflict with decisions in the Second Circuit in *I. U. E.* v. *Westinghouse Electric Corp.*, 218 F. Supp. 82 (S. D. N. Y. 1963), aff'd., 326 F. 2d 758 (2d Cir. 1964), where the Court of Appeals affirmed the refusal of the District Court to determine the defense of laches which was raised in connection with an alleged delay in seeking arbitration. As the District Court had stated therein:

> The defendant's challenge to four of the grievances, insofar as it advances the *plea of laches;* may be readily disposed of. *Any contention of delay in the presentation and prosecution of grievances is a matter within the competence of the arbitrator if otherwise they are arbitrable.* (218 F. Supp. at 86) (Emphasis supplied)

In rendering this decision, the District Court relied upon the Second Circuit's decision in *Wiley* which was subsequently affirmed by this Court.

Furthermore, the Third, Fifth and Ninth Circuits have relied upon *Wiley, supra,* and held that questions of delay

in seeking arbitration should be referred to arbitration and not the federal courts. See *Local Lodge No. 595 of Dist. No. 152* v. *Howe Sound Co. (Inc.)*, 350 F. 2d 508 (3rd Cir. 1965); *United Steelworkers of America* v. *American Int'l. Aluminum Corp.*, 334 F. 2d 147 (5th Cir. 1964), cert. denied, 379 U. S. 991 (1965); *Columbian Carbon Co.* v. *IUOE Local No. 405*, 360 F. 2d 1018 (5th Cir. 1966); *Local Union No. 490 United Rubber, Cork, Linoleum, and Plastic Wkrs.* v. *Kirkhill Rubber Co.*, 367 F. 2d 956 (9th Cir. 1966).

On the other hand, the Sixth Circuit in *Amalgamated Clothing Wkrs.* v. *Ironall Factories Co., Inc.*, 386 F. 2d 586 (6th Cir. 1967) supported and was relied upon by the Majority below.

Finally, the opinion of the Majority below is in direct conflict with its own prior decision in *Local Union No. 51, IBEW* v. *Illinois Power Co.*, 357 F. 2d 916 (7th Cir. 1966) wherein the Seventh Circuit held that the defense of *waiver* in connection with an alleged delay in seeking arbitration is a question for the arbitrator and not for the federal court. It should be noted that waiver, as laches, is an affirmative defense under the Federal Rules of Civil Procedure relating to delay in the exercise of a right.[10] It is submitted that whether one labels the defense of delay as "laches" or "waiver", the same considerations nevertheless apply. Such a question of delay in seeking arbitration is required to be submitted to an arbitrator rather than a federal court.

10. Fed. R. Civ. P. 8(c).

CONCLUSION.

For the reasons stated herein, it is respectfully requested that a Writ of Certiorari be granted.

Respectfully submitted,

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Dated at Chicago, June 24, 1971.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS

for the Seventh Circuit.

September Term, 1970 — September Session, 1970

No. 18334

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO, *Plaintiff-Appellant,*

vs.

FLAIR BUILDERS, INC., *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

FEBRUARY 5, 1971.

Before SWYGERT, *Chief Judge,* DUFFY, *Senior Circuit Judge, and* STEVENS, *Circuit Judge.*

SWYGERT, *Chief Judge.* The primary question in this appeal is whether a court may properly dismiss the complaint on the basis of laches resulting from dilatory notification of the existence of a dispute in a suit brought to compel arbitration with regard to the dispute.

This action was brought in November 1968 by the International Union of Operating Engineers, Local 150, AFL-CIO, under section 301 of the Labor Management Relations Act of 1947, 29 U. S. C. § 185(a), against Flair Builders, Inc., a construction company located in Sugar Grove, Illinois.

Initially, the union sought specific performance of an alleged bargaining agreement between the parties. Upon Flair's motion the district court dismissed the complaint for failure to state a claim. At the time of the dismissal the district judge, having observed that an "additional issue" had been suggested by the parties, namely, whether a "memorandum agreement" executed by the parties constituted a binding collective bargaining agreement, suggested that this issue be submitted to arbitration. Thereafter, the union demanded arbitration of "the issues pending before the court concerning the applicability of the contract and the subsequent issues of possible violations." After Flair refused to arbitrate, the union filed an amended complaint seeking to compel arbitration.

The company filed a motion to dismiss the amended complaint, contending that the action was barred by laches. The motion was denied, and the cause was set for an evidentiary hearing to determine which issues, if any, the employer agreed to arbitrate. After hearing evidence, the court filed its order and memorandum opinion dismissing the action. A summary of the evidence submitted to the district court follows.

The union represents laborers who operate heavy equipment, such as cranes, in the construction industry and negotiates master collective bargaining agreements with contractor associations in various parts of Illinois. The union also negotiates individual memoranda of agreement with contractors who are not members of the contractor associations, such as Flair. These memoranda adopt and bind the nonmember contractor to the terms of the master agreements.

On June 1, 1963, the union entered into a master agreement with a number of contractor associations in northern Illinois. This agreement terminated on May 31, 1966. On

May 12, 1964, the union and Flair signed a memorandum of agreement which specifically adopted the terms of the then existing master agreement. Flair also agreed to adopt any additional master agreements entered into between the union and the contractor associations.

At the time of execution of the memorandum in 1964, the company had one employee covered by the agreement. Upon the insistence of the union this employee joined the union, but left his employment about two weeks later. Other nonunion employees continued from time to time to operate Flair's single piece of equipment. In 1965 the company added a second piece of heavy equipment, in 1966 a third, and in 1967 a fourth, all of which were operated by company employees who were nonunion. Yet during all this period of time, from May 1964 until the summer of 1968, the company was not contacted by the union.

In the meantime, in 1966, the union and the contractor associations entered into a new master agreement which contained a stipulation that "should any difference arise between the parties hereto which cannot be settled by their representatives, within 48 hours of the occurrence, such difference shall be submitted to arbitration." It was further stipulated that the arbitrators should meet within six days after it was determined that the dispute could not be settled.

In June 1968, the union business agent visited the company's job site and discovered a nonunion employee operating a piece of equipment. Shortly thereafter, the employee joined the union; however, the company refused to pay the union wage scale.[1] Subsequently the union filed the instant suit.

1. In the fall of 1968 the union filed a complaint with the Wage and Hour Division of the Department of Labor on behalf of the employee for back wages. After the complaint was sustained, the employee was discharged. Thereupon an unfair labor practice

In dismissing the action, the district court ruled that the union had been guilty of laches by its unjustified delay in the enforcement of its contract with the company. In the course of his memorandum opinion the district judge said:

> To require Flair to respond, through arbitration, to general charges of noncompliance with contract provisions allegedly beginning more than two years before this suit was filed would impose an extreme burden on its defense efforts. Especially is this so when, as demonstrated at the hearing, Flair understandably considered the contract to have been abandoned soon after its inception. Plaintiff has offered no explanation for its delay in enforcement; yet to compel arbitration would reward plaintiff for its own inaction and subject defendant to the risk of liability because of actions taken or not taken in reliance on plaintiff's apparent abandonment.

The district judge also found that there had been no contact whatsoever between the union and Flair from the date of the signing of the memorandum of agreement in 1964 until the summer of 1968. This determination was made after the district judge had heard conflicting testimony and concluded that the testimony of Flair's witness was more credible than that of the union's business agent because of inconsistencies in the latter's testimony. Such findings of fact based on the credibility of witnesses are entitled to great weight on review. The record reveals no justification for overturning the trial court's findings. Moreover, when the trial judge requested that " the [union] by letter to this court within ten days should specify in some detail what violations of the purported agreement it seeks to arbitrate, and the time of

charge was filed with the National Labor Relations Board. As part of a settlement agreement between the Board and the company, the employee received back pay and was offered reinstatement.

their occurrence . . . ," the union's response was devoid of specificity and amounted to nothing more than the concluding statement of its letter that it sought "to arbitrate the total violation of the entire agreement in question since . . . June 1, 1966."

The factual context of this appeal thus narrows the issue before us to the question of whether a party to a collective bargaining agreement which contains an arbitration clause may be so dilatory in making the existence of vaguely delineated disputes known to the other party that a court is justified in refusing to compel the submission of such disputes to arbitration. The district court found for Flair and dismissed the complaint on the ground of laches. We affirm.

The union contends that the question of whether its dilatory notification of the existence of a dispute should operate to bar this suit to force the employer to arbitration is a question of procedural timeliness which courts are required to leave to the arbitrator for determination pursuant to the Supreme Court's decision in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543 (1964). We find the characterization of such delay as "procedural untimeliness" inappropriate.

The procrustean reading of *Wiley* urged by the union is unsupported by the language of the opinion, and we are convinced that nothing said in *Wiley* forecloses judicial determination that a dispute is so stale before its announcement that courts should decline to compel its submission to arbitration.

Wiley arose out of the refusal by the surviving corporation of a corporate merger to submit to arbitration a dispute between it and a union which had executed a collective bargaining agreement including an arbitration clause with another corporation which did not survive the

merger. As Mr. Justice Harlan noted in the opinion of the Court, the major questions presented in *Wiley* were:

> (1) whether a corporate employer must arbitrate with a union under a bargaining agreement between the union and another corporation which has merged with the employer, and, if so, (2) whether the courts or the arbitrator is the appropriate body to decide whether *procedural prerequisites which, under the bargaining agreement, condition the duty to arbitrate* have been met. 376 U. S. at 544 (emphasis added).

It is thus apparent that, to the extent *Wiley* was concerned with the issue of timeliness of a demand for arbitration, it dealt only with who must decide whether arbitration is barred by untimeliness in the satisfaction of some procedural prerequisite to arbitration deriving from the dictates of the grievance process itself. This conclusion is amply supported by other language in the opinion. For example, the Court stated:

> [W]e do not rule out the possibility that a union might abandon its right to arbitration by failing to make its claims known. . . . The Union made its position known well before the merger and never departed from it. 376 U. S. at 551.

We therefore conclude that *Wiley* determined only that the effect of *intrinsic* untimeliness relating to whether the dictates of a prescribed process for the resolution of union-employer disagreements have been satisfied must be determined by the arbitrator. But that is not the form of delay presently before us. The delay of the union in this case is more appropriately described as *extrinsic* untimeliness in that it does not raise any question of whether prescribed procedures for the resolution of disputes have been satisfied but rather requires the determination of whether delay in the mere notification of the existence of a dispute has prejudiced the ability of the

employer to respond without regard to whether procedural prerequisites to arbitration have been followed. As another circuit has observed in a similar case:

> In deciding whether the union, in this case, is barred from prosecuting its cause of action because of laches, we are not indulging in the judicially unwarranted task of interpreting the collective bargaining agreement. Laches is independent of any procedure established by the collective bargaining agreement and a decision on laches adds or subtracts nothing from the meaning of the agreement. Furthermore, consideration of the issue in no way involves a consideration of the merits of the underlying substantive issue. . . . The union first gave notice of the existence of a dispute . . . more than one year after the dispute arose. . . . Failure to give notice and request arbitration until such a late date would present serious impediments to [the employer] in making an effective defense. *Amalgamated Clothing Workers* v. *Ironall Factories Co.*, 386 F. 2d 586, 591-92 (6th Cir. 1967).

In the instant case, the union is seeking to compel arbitration of an amorphous dispute as to general noncompliance with the provisions of a collective bargaining agreement. Assuming, *arguendo,* that notice of a dispute is effectively given when stated with as little specificity as here, we note that the district court determined from the testimony of conflicting witnesses that there was no contact whatever between the employer and the union from the effective date of the June 1, 1966 master agreement until the summer of 1968. From this, the district court determined that the union's suit to compel arbitration was barred by laches. We find no error in that determination.

The judgment of the district court is affirmed.

STEVENS, *Circuit Judge*, dissenting. This litigation arises out of a collective bargaining agreement which Flair executed in 1964 and which was still in effect when the union filed its complaint in 1968. The union asserts that Flair failed to pay the agreed wages to one employee in 1964, hired nonunion employees in 1965, 1966, and 1967, and generally refused to follow contract procedures for hiring personnel and contributing to a pension fund. The employer defended on the ground that the contract had been abandoned by the union and, therefore, was no longer in effect. The trial court rejected the abandonment defense but held that the union was guilty of laches.

The appropriateness of laches as a defense to a labor dispute involves a consideration of several questions which can best be answered by one who is familiar with the collective bargaining relationship between the parties. Although the trial court stated that the defense of the union's charges would impose an "extreme burden" on Flair, the record does not answer these questions: Does the area-wide master agreement contemplate that a small employer like Flair shall have the burden of full compliance with its terms? Would routine records ordinarily retained by employers disclose the information on which Flair relies to justify its disregard of its written undertakings? Was the lack of communication between the union and Flair entirely the fault of the union? Even if it was too late in 1968 for the union to question Flair's breaches in 1964 and 1965, was it also too late to ask a neutral third party to pass judgment on 1966 and 1967 breaches, as well as a continuing refusal to abide by the agreement?

The task of answering questions such as these—determining whether the union's delay was unreasonable and whether Flair's defense has been significantly prejudiced

by that delay—inevitably involves a consideration of the merits of the underlying dispute between the parties. This task should, therefore, be performed by the arbiter who is also responsible for deciding the merits of the basic controversy.

Considerations affecting the orderly dispositions of litigation, as well as a due regard for our national labor policy, persuade me that the defense of laches should be processed like other "procedural" questions which grow out of the dispute and bear on its final disposition. See *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 556-559; *Local Union No. 51, International Brotherhood of Electrical Workers, AFL-CIO* v. *Illinois Power Company*, 357 F. 2d 916, 918-919 (7th Cir. 1966). Separating laches from the merits for trial before a separate tribunal will frequently result in an unnecessary duplication of effort and may commit the disposition of the laches issue to the tribunal which is less qualified to evaluate it fairly in the context of the collective bargaining relationship. Moreover, even in those cases which are promptly terminated by judicial approval of the defense, the price for efficieney will be some loss of union confidence in the fairness of the procedures which are offered as a substitute for collective self-help. Unless arbitration procedures command labor's respect, less civilized methods of resolving disputes will be employed with greater frequency.

In many collective bargaining agreements the employer has obtained a "no strike" pledge from the union in exchange for a commitment to arbitrate disputes. Unions must honor that bargain. *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U. S. 235. We should compel employers to honor their *quid pro quo*. I would reverse.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT.
* * * (Caption—68-C-2091) * *

MEMORANDUM OPINION.

This is an action to compel arbitration of a labor dispute pursuant to Section 301 of the Labor Management Relations Act, 29 U. S. C. § 185(a). Presently pending before the court is the question whether the parties are bound to submit their differences to arbitration by a valid collective bargaining agreement. Evidence relative to this issue was presented at a hearing on October 24th of this year.

On May 12, 1964, plaintiff union and defendant Flair entered into a memorandum contract in which they agreed to be bound by the "master" agreement then in force between plaintiff and certain General Contractor's Associations, and by subsequent master agreements. The arbitration clause here invoked is found in the master agreement of June 1, 1966.

Defendant challenges the validity of the contract, arguing that it is void and unenforceable for "lack of mutuality." However, the memorandum agreement binds the plaintiff as well as the defendant to the terms and conditions of the master agreement. And similar "incorporating" contracts have uniformly been upheld as valid and binding. See, *e.g.*, *Schlecht* v. *Hiatt*, 271 F. Supp. 644 (D. Ore. 1967); *Line Drivers Local* v. *W. J. Digby, Inc.*, 218 F. Supp. 519 (D. Col. 1963); *cf. Thorn Construction*

Co. v. *International Hod Carriers*, 75 Nev. 420 (1959).[1] Accordingly, I have determined that defendant was bound by the memorandum agreement to arbitrate labor disputes within the limits of the arbitration clause.

The question remains, however, whether the union has been guilty of laches so as to bar it from enforcement of the arbitration cla[illegible].[2] Its complaint seeks to arbitrate its charges that Flair has been in continuous breach of the agreement since June 1, 1966 by its refusal to hire through the union office, pay union wages, or contribute to union funds.

The master agreement contemplates initiation of arbitration proceedings if any dispute is not settled within 48 hours of its occurrence, and further provides that the Board of Arbitrators shall meet "within six (6) days." Yet demand for arbitration was not made in this case until April, 1969, almost five years from Flair's first alleged failure to comply with the contract and nearly three years from the inception of the alleged breach sought to be arbitrated. At the hearing, Robert Richards, the president of Flair, testified that he had no contact whatsoever with the union from the signing of the memorandum contract in 1964 until the summer of 1968, nor did he receive a copy

1. *Ketcher* v. *Sheet Metal Workers International Association*, 115 F. Supp. 802 (E. D. Ark. 1953), and *Teamsters Local 839* v. *Morrison-Knudsen Co.*, 270 F. 2d 530 (9th Cir. 1959), relied on by defendant, are not in point for they did not involve contracts personally entered into by the employer.

2. Although "procedural" questions are to be determined by the arbitrator rather than by the court, *John Wiley & Sons* v. *Livingston*, 376 U. S. 543, 557 (1964), the issue of laches with regard to an arbitration demand is independent of the bargaining contract and therefore properly determined by the court. *Amalgamated Clothing Workers* v. *Ironall Factories Co.*, 386 F. 2d 586, 591 (6th Cir. 1967); *International Ass'n. of Machinists* v. *Hayes Corporation*, 296 F. 2d 238, 244 (5th Cir. 1961); *cf. Reconstruction Finance Corp.* v. *Harrisons & Crosfield*, 204 F. 2d 366, 369 (2d Cir. 1953).

of the 1966 master contract. Furthermore, his only employee within the jurisdiction of plaintiff union quit within a month of the execution of the 1964 agreement; consequently, Flair considered the contract to have been abandoned.

The plaintiff's business agent, Ambrose Meagher conceded that he had no contact with Flair in 1965 or 1966, but contended that he had some discussions with Richards in 1964, 1967 and 1968. Cross-examination revealed inconsistencies, however, between his direct testimony and prior deposition testimony regarding his 1967 visits to the job site, and I find Richards to be the more credible witness.

To require Flair to respond, through arbitration, to general charges of noncompliance with contract provisions allegedly beginning more than two years before this suit was filed would impose an extreme burden on its defense efforts. Especially is this so when, as demonstrated at the hearing, Flair understandably considered the contract to have been abandoned soon after its inception. Plaintiff has offered no explanation for its delay in enforcement; yet to compel arbitration would reward plaintiff for its own inaction and subject defendant to the risk of liability because of actions taken or not taken in reliance on plaintiff's apparent abandonment. *Cf. Amalgamated Clothing Workers v. Ironall Factories, Co., supra,* at 592.

Because plaintiff has been guilty of laches by its unjustified delay in the enforcement of its contract with defendant, an order has been entered today dismissing the complaint.

Enter:

BERNARD M. DECKER,
United States District Judge.

Dated: December 4, 1969.

APPENDIX C.

Section 301(a) of the Labor Management Relations Act, 1947, Title III, 61 Stat. 156, 29 U. S. C. 185(a), as amended, reads as follows:

TITLE III

SUITS BY AND AGAINST LABOR ORGANIZATIONS

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-41

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO,

Petitioner,

vs.

FLAIR BUILDERS, INC.,

Respondent.

SUPPLEMENT TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

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OCTOBER TERM, 1971.

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INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO,

Petitioner,

vs.

FLAIR BUILDERS, INC.,

Respondent.

SUPPLEMENT TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

THE NATURE OF THE SUPPLEMENT TO THE PETITION.

On July 8, 1971, International Union of Operating Engineers, Local 150, AFL-CIO (hereinafter referred to as the "Petitioner"), filed a Petition for Writ of Certiorari to review a judgment of the United States Court of Appeals for the Seventh Circuit. Thereafter, Flair Builders, Inc. (hereinafter referred to as the "Respondent"), failed to file a Brief in Opposition within the time required under the Rules of this Court. On September 10, 1971, this Court requested that the Respondent file a Brief in Opposition by October 12, 1971, which time was thereafter extended to November 11, 1971 at the Respondent's request.

Subsequent to the filing of the Petition in this case, new decisions have been rendered by certain Courts of Appeals which directly bear upon the issues raised in said Petition. Accordingly, the instant Supplement is submitted pursuant to Rule 24(4) of this Court.

REASONS FOR GRANTING THE WRIT.

THE INSTANT HOLDING IS IN DIRECT CONFLICT WITH OPINIONS OF THE FEDERAL COURTS OF APPEALS.

On September 16, 1971, the Court of Appeals for the Fourth Circuit held in *Tobacco Workers International Union, Local 317* v. *Lorillard Corporation,* ..... F. 2d ..... (4th Cir. 1971) that the defense of laches cannot be considered by a federal court in a suit seeking arbitration brought under Section 301, 29 U. S. C. § 185(a), of the Labor Management Relations Act (Laches holding, Appendix, this Brief, pages 16-23).[1] Accordingly, the Court held that the issue of laches must be determined by an arbitrator rather than by the federal court.

In rendering its decision, the Court of Appeals considered the decision of the Seventh Circuit in the instant matter[2] and the decision of the Sixth Circuit in *Amalgamated Clothing Workers* v. *Ironall Factories Co.,* 386 F. 2d 586 (6th Cir. 1967) regarding the defense of laches and held that these decisions are contrary to federal law as follows:

> We think the reasoning of *Flair Builders* and *Ironall Factories* is contrary to the body of federal case law dealing with the enforcement of labor arbitration clauses in collective bargaining agreements that has developed since the decision in *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448 (1957).
>
> (Appendix, this Brief, Page 17)

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1. The opinion of the Fourth Circuit is reproduced in full (without its appendix) in the Appendix to this Supplement.

2. *International Union of Operating Engineers, Local 150, AFL-CIO* v. *Flair Builders, Inc.,* 440 F. 2d 557 (7th Cir., 1971).

Accordingly, the decision of the Fourth Circuit in *Tobacco Workers* is in direct conflict with the decision of the Seventh Circuit in the instant matter.

In addition, there is a conflict within the Seventh Circuit itself as to the issue of laches. In a decision rendered on July 9, 1971—only one day after the instant Petition was filed—the Seventh Circuit held in *Halcon International, Inc.* v. *Monsanto Australia Limited*, 446 F. 2d 156 (7th Cir. 1971), a commercial arbitration case, that the defense of laches must be determined by an arbitrator rather than by the federal court. In that opinion, the Majority attempted to distinguish its decision from that in the instant matter.

However, in the Dissent in *Halcon*, Judge Swygert, who wrote the Majority opinion in the instant case, stated that the "principles defining the respective spheres of jurisdiction between courts and arbitrators" regarding the defense of laches are the same in both *Flair* and *Halcon*, and accordingly, the issue of laches should have been decided by the Court in *Halcon*.

Therefore, not only does a conflict exist among the Courts of Appeals concerning the appropriate forum to determine the issue of laches, but also exists within the Seventh Circuit itself.

CONCLUSION.

For the reasons stated in the Petition and herein, it is respectfully requested that a Writ of Certiorari be granted.

Respectfully submitted,

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Dated at Chicago, October 14, 1971.

APPENDIX.

UNITED STATES COURT OF APPEALS,
For the Fourth Circuit.

Nos. 15,343 & 15,344.

TOBACCO WORKERS INTERNATIONAL UNION, LOCAL 317,
Appellant,

vs.

LORILLARD CORPORATION,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT GREENSBORO.
EDWIN M. STANLEY, DISTRICT JUDGE.

(Argued May 3, 1971 Decided September 16, 1971.)

Before HAYNSWORTH, *Chief Judge,* and CRAVEN and RUSSELL, *Circuit Judges.*

CRAVEN, *Circuit Judge:*

Tobacco Workers International Union, AFL-CIO, Local 317 (hereinafter the Union) brought this action pursuant to § 301 of the Labor-Management Relations Act, 29 U. S. C. § 185, against the Lorillard Corporation (hereinafter the Company) in the District Court for the Middle District of North Carolina for specific performance of a collective

bargaining agreement clause providing for arbitration of employee grievances. The District Court ordered arbitration of some of the grievances and refused to order arbitration of the rest.[1] Both the Company and the Union appeal from the portions of the District Court judgment adverse to them. We conclude that all the grievances are arbitrable, and affirm in part and reverse in part.

The collective bargaining agreement which applies to this suit was entered into by the Union and the Company on March 1, 1965, and was in effect from that date to March 1, 1968. The agreement provides a grievance procedure which can be instituted by any employee who believes "he or she has been unjustly dealt with."[2] Grievances which involve either disciplinary action claimed to have been imposed without just cause or application of the agreement's seniority provisions with respect to promotions, layoffs, and recalls may be submitted to arbitration at the request of the Union.[3] The contract provides for departmental seniority. When a job vacancy occurs within a department, employees within the department who wish to fill the opening bid for it. The employee with the greatest seniority is given the job, provided that he or she is qualified to do the work.[4] Like promotions, layoffs and recalls are made on a departmental basis. Employees are laid off in the inverse order of their seniority provided that the senior employees retained have the ability to do the work remaining in the de-

1. The opinion of the District Court is reported as Tobacco Workers Local 317 v. P. Lorillard Corp., 314 F. Supp. 513 (M. D. N. C. 1970).

2. See Article 22, Section 1, of the agreement set out in the Appendix, *infra*.

3. See Article 23 of the agreement set out in the Appendix, *infra*.

4. See Article 14, Section 3, of the agreement set out in the Appendix, *infra*.

partment during the layoff. Recalls are made in the reverse order in which the employees are laid off.[5]

The bargaining agreement which was in effect prior to the March 1, 1965, agreement contained separate pay scales and separate job classifications for male and female employees. Apparently in response to the Title VII of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000e to 2000e-15, the denomination of jobs as either male jobs or female jobs was eliminated from and a non-discrimination clause[6] was added to the March 1, 1965, agreement. In spite of the change in contract language, the Company continued to consider only male employees for jobs reserved for males under the previous contract and only female employees for jobs previously reserved for females. Each of the seven grievances which make up the subject matter of this action claim that the Company's continuation of this policy denied them the right to do certain kinds of work being performed by employees with less seniority in violation of the agreement's seniority provisions regarding promotions, layoffs and recalls.

Four of the grievances were filed late in 1965. The first two, filed by Betty Mae Greenwale and Ruby A. Fields (hereinafter Fields I), claimed that the female grievants had bid on job vacancies that arose in their department, that they had greater seniority than the employee who was awarded the job, and that they were not considered for the vacancies because the jobs were limited to male employees. The next two grievances, filed by Ruby Stanley and James M. Talley, were filed in response to the Company's announcement of an impending layoff. Both grievances claimed that the grievants should not be included

5. See Article 14, Sections 4 and 5, of the agreement set out in the Appendix, *infra*.

6. See Article 14 of the agreement set out in the Appendix, *infra*.

in the layoff because employees with less seniority who were performing jobs traditionally limited to employees of the opposite sex were not included in the layoff. The grievance filed by Ruby Stanley was signed by five additional female employees in the same department, Barbara Vaden, Fleeta Mae Ayers, Katherine Fuller, Jean A. Way and Della K. Hunter. The Company contends this was a single grievance of Ruby Stanley. The Union contends it was a multiple grievance.

The Company refused to grant the relief requested by each of the grievants and, at first, refused to submit any of the grievances to arbitration. Subsequently, however, the Company agreed to submit the Greenwale grievance to arbitration. On July 15, 1966, the arbitrator issued an opinion and award which determined that the subject matter of the grievance was within the agreement's arbitration clause and that the agreement required job vacancies to be filled on the basis of the seniority of the qualified employees bidding for it without regard to sex. The matter was remanded back to the parties to determine whether Betty Mae Greenwale had the necessary qualifications to do the job she had bid for.

After the arbitrator's decision, the Company decided to give Betty Mae Greenwale the job she had bid for. During the period of time that the Greenwale grievance was being arbitrated, a number of the Company's employees were on layoff. Apparently as a result of a need for an increase in work force that arose at about the same time as the arbitrator's decision, the Company recalled the employees who had been laid off on August 1, 1966. Concurrent with the recall, those employees who had filed grievances earlier were given the jobs, formerly reserved to employees of the opposite sex, that they had asked for.

Upon being recalled to work, a number of the female

employees inquired as to whether they would be given retroactive pay for the period during which they had either been laid off or denied requested promotions. The Company responded in the negative. This prompted the filing of three more grievances. Ruby A. Fields filed a second grievance (hereinafter Fields II) referencing her earlier one and requesting retroactive pay. Jean A. Way filed a grievance as a representative of "the girls of the packing department" claiming their layoff was unjust and requesting back pay. Evelyn Gaines filed a similar grievance representing "the [women] of the making department." The Company refused the Union's request to consider these grievances on the ground that they were not filed within the time limits specified in the agreement.

The Company raises four reasons why they should not be compelled to arbitrate the grievances:

> (1) the Union failed to process some of the grievances within the time limits specified in the contract (Tally, Fields II, Way, and Gaines);
>
> (2) a number of the grievances were satisfactorily adjusted when the Company granted the grievants the jobs they had requested (Greenwale, Fields I, and Stanley);
>
> (3) the Fields II grievance is not arbitrable because the contract does not specifically provide for retroactive pay where an employee is denied a requested promotion and the arbitrator is not allowed to "impose . . . [an] obligation not explicity [sic] provided for in [the] Agreement."
>
> (4) the entire action is barred by the Union's laches.

The District Court held that the issues of laches and procedural timeliness were questions for the arbitrator to decide and not for the courts; that the Greenwale, Fields I, and Stanley grievances were satisfactorily adjusted by

awarding the grievants the position they requested;[7] that the Fields II grievance was not arbitrable because the contract provided for back pay only in cases of unjust layoff and recall and not in cases of refusal to promote; and that the contract requires that grievances be filed individually by each aggrieved employee and does not allow representative grievances. The net result was that the District Court directed arbitration of the Talley, Way and Gaines individual grievances and refused to compel arbitration of the others including the Way and Gaines grievances insofar as they attempted to grieve for employees other than themselves.

I. Procedural Questions.

We think the District Court was clearly correct in deciding that the question of whether the grievances were timely filed was for the arbitrator. The Supreme Court resolved a split of authority that had existed among the circuits in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543 (1964), concluding that procedural questions are for the arbitrator. Part of the rationale for this result was that in many cases the merits of the dispute and the question of grievance procedure will be intertwined "raising the same questions on the same facts." The Company urges upon us the negative inference of this rationale, *i.e.*, where the merits and the procedural questions are not so intertwined, the procedural questions should be decided by the courts and not the arbitrator.

We do not think the "intertwining" reason advanced in *John Wiley* can be elevated to the negative principle urged

7. The Union does not appeal from the District Court's decision that the Greenwale and Fields I grievances are not subject to arbitration. The correctness of the District Court's decision that these grievances have been "satisfactorily adjusted" is therefore not before us.

upon us by the Company. The difficulty of separating procedural and substantive questions was not the only reason for the Supreme Court's conclusion that procedural questions should be decided by the arbitrator. The Court was also concerned about "the opportunities for deliberate delay and the possibility of well-intentioned, but no less serious delay created by separation of the 'procedural' and 'substantive' issues." 376 U. S. at 558.[8] The various circuits have invariably applied the *John Wiley* rule, without discussion of whether the procedural and substantive questions were independent of each other, in cases where the procedural questions were not, in fact, intertwined with the merits. See *Trailways, Inc.* v. *Motor Coach Employees Division 1318*, 343 F. 2d 815, 818 (1st Cir.), *cert. denied*, 382 U. S. 879 (1965); *Carey* v. *General Electric*, 315 F. 2d 499 (2d Cir. 1963); *cert. denied*, 377 U. S. 908 (1964); *Local 595, District 152, Machinists* v. *Howe Sound Co.*, 350 F. 2d 508 (3d Cir. 1965); *Bealmer* v. *Texaco, Inc.*, 427 F. 2d 885 (5th Cir.), *cert. denied*, 400 U. S. 926 (1970); *Meat Cutters Local 405* v. *Tennessee Dressed Beef Co.*, 428 F. 2d 797 (6th Cir. 1970); *Yellow Cab Co.* v. *Democratic Union Organizing Committee Local 777*, 398 F. 2d 735 (7th Cir. 1968), *cert. denied*, 393 U. S. 1015 (1969); *Local 198, Rubber Workers* v. *Interco, Inc.*, 415 F. 2d 1208 (8th Cir. 1969); *Local 490, Rubber Workers* v. *Kirkhill Rubber Co.*, 367 F. 2d 956 (9th Cir. 1966); *UAW* v. *Folding Carrier Co.*, 422 F. 2d 47 (10th Cir. 1970). Where the argument the Company makes here has been raised, it has been rejected. *Rochester Telephone Corp.* v. *Communication Workers*, 340 F. 2d 237 (2d Cir. 1965); cf. *Industrial Scientists* v. *Shell Development Co.*, 348 F. 2d 385 (9th Cir. 1965).

We think, additionally, that the District Court's deter-

8. The potential for delay is apparent from this case. The complaint was filed on May 15, 1967. The final judgment of the District Court was filed on August 10, 1970, more than three years later, and we heard argument on May 3, 1971.

mination that the Way and Gains grievances were arbitrable only as individual grievances and not as the grievances of a group of employees and that the Stanley grievance was not arbitrable because it was satisfactorily adjusted was error. Whether a group of employees who have an identical complaint must each file separate grievances or whether they can instead, in the interest of administrative convenience, choose a representative to file a single grievance for the entire group is clearly a question of grievance procedure which arises as a collateral issue to the substantive claim in the grievance and as such is a question to be decided by an arbitrator. *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543 (1964).[9]

The District Court concluded that the Stanley grievance was satisfactorily adjusted because grievants were awarded the positions they sought and the written grievance contains no demand for retroactive pay. Although this conclusion does not appear on its face to be one involving a question of grievance procedure, there are two unstated premises that underlie the conclusion: (1) that a grievant must state explicitly all forms of appropriate relief for the Company's alleged breach of the agreement; (2) that the question of whether the agreement requires specific delineation of the remedies is one to be decided by the court and not the arbitrator. The first premise involves a matter of grievance procedure, *i.e.*, how detailed must the writ-

9. Compare the cases holding that the question of whether multiple grievances should be submitted to a single arbitrator or multiple arbitrators is for the arbitrator to decide. Avon Prods., Inc. v. UAW, Local 710, 386 F. 2d 651 (8th Cir. 1967); Fitchburg Paper Co. v. MacDonald, 242 F. Supp. 502 (D. Mass. 1965); Local 469, Teamsters v. Hess Oil & Chem. Corp., 226 F. Supp. 452 (D. N. J. 1964).

ten grievance be, and therefore the second premise is erroneous.[10]

II. Remedies.

The District Court refused to compel arbitration of the Fields II grievance because the contract did not specifically provide for retroactive pay in the case of unjust layoffs. The District Court based its conclusion on the sentence in Article 23 which states "The arbitrator shall have no authority to add to or subtract from, or in any way alter or

10. The Company argues that the District Court should be affirmed on this point because the Stanley grievance is frivolous and that the Tally grievance should receive the same treatment. The Supreme Court has expressly rejected the notion that a federal court could refuse to compel arbitration because it felt the claim to be frivolous. United Steelworkers v. American Mfg. Co., 363 U. S. 564 (1960). "[N]o matter how frivolous the merits of the grievance, [if] it is within the grievance and arbitration provisions, it must be processed through them." Machinists Lodge 1652 v. International Aircraft Services, Inc., 302 F. 2d 808, 815 (4th Cir., 1962). See also F & M Schaefer Brewing Co. v. Local 49, Brewery Workers, 420 F. 2d 854 (2d Cir. 1970); Galveston Maritime Ass'n v. Longshoremen Local 307, 234 F. Supp. 250 (S. D. Tex. 1964); Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1513-15 (1959).

The closest any court has come to stating that the court may refuse to compel arbitration if the grievance is without merit is the recognition of the possibility that a grievant's claim may be so totally devoid of merit as to amount to a "perversion of the grievance procedure." IUE v. General Electric Co., 407 F. 2d 253, 259 n. 12 (2d Cir. 1968); Local 787, IUE v. Collins Radio Co., 317 F. 2d 214 (5th Cir. 1963). Even if we were to accept the notion that the District Court may examine the merits to such an extent, this case falls far short of such a test. The Stanley and Talley grievances were filed prior to the layoff. At the time they were filed, there was no question of back pay because the grievants were still working. They were seeking to prevent their being laid off; and had they been successful, the question of back pay would never have arisen. The agreement specifies that employees unfairly laid off will receive back pay. Article 22, Section 2, set out in the Appendix, *infra*. An arbitrator might well conclude that this section of the agreement automatically makes back pay one of the remedies for an unjust layoff whether it is claimed in the written grievance or not.

modify any of the terms of this Agreement, or to impose on any party hereto a limitation or obligation not explicity [sic] provided for in this Agreement." This we think was error.

The quoted sentence does not, we think, limit the arbitrator's "jurisdiction" over those grievances which are subject to arbitration. It is not a limitation on arbitrability, but is instead merely a limitation on the arbitrator's power to fashion an award. *Carey* v. *General Electric Co.*, 315 F. 2d 499 (2d Cir. 1963), *cert. denied*, 377 U. S. 908 (1964). As such it is inappropriate for a court to decide that such a clause excludes the remedy sought prior to arbitration. It is best to leave this question to the arbitrator initially in order to receive "the benefit of the arbitrator's interpretive skills as to . . . his contractural authority." *Torrington Co.* v. *Metal Products Workers*, 362 F. 2d 677, 680 n. 6 (2d Cir. 1966).

Even if we interpret the quoted sentence as a limitation on arbitrability, we do not think it excludes the Fields II grievance. The Company argues that retroactive pay for unjustly denying an employee a promotion is an "obligation not explicity [sic] provided for in this Agreement." But the agreement contains no provision for any kind of remedy in cases involving promotions. Carried to its logical conclusion, the Company's argument would mean that an arbitrator would have jurisdiction to determine that the Company had violated the seniority provisions with respect to promotions, but would have no authority to direct the Company to correct its violation.[11] Arbitration

11. Recognizing this apparent dilemma, the Company argues to us that implicit in the seniority provisions of the agreement is "the commonplace remedy of awarding to the employees the job which was unjustly denied." The Company does not explain, however, why awarding the job sought is a commonplace remedy and awarding retroactive pay is not. Indeed, the Union took the position in the court below that it had been the Company's practice in the past to grant retroactive pay to employees who had been unjustly denied promotions.

would thus be rendered meaningless. *Yellow Cab Co.* v. *Democratic Union Organizing Committee, Local 777,* 398 F. 2d 735 (7th Cir. 1968), *cert. denied,* 393 U. S. 1015 (1969).[12]

While a contract may contain provisions detailing what remedies should be applied to compensate for a particular breach, labor contracts, like other contracts, commonly do not.[13] Part of what the parties bargain for when they include an arbitration provision in a labor agreement is the "informed judgment" that the arbitrator can bring to bear on a grievance, especially as to the formulation of remedies. *United Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U. S. 593, 597 (1960). Therefore, we conclude that, although the agreement is silent as to remedies, the fashioning of an appropriate remedy is not an addition to the obligations imposed by the contract. In deciding that the agreement did not provide for retroactive pay in promotion cases, the District Court usurped the function of the arbitrator. See *Lynchburg Foundry Co.* v. *Steelworkers Local 2556,* 404 F. 2d 259 (4th Cir. 1968); *Lodge 12, Machinists* v. *Cameron Iron Works,* 292 F. 2d 112 (5th Cir.), *cert. denied,* 368 U. S. 926 (1961).

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12. "[Arbitrators] have quite uniformly held that the parties were not engaged in an academic exercise in seeking a ruling as to whether the contract had been violated, and that the power to decide the contract violation must carry with it the power to award a remedy." Fleming, Arbitrators and the Remedy Power, 48 Va. L. Rev. 1199, 1212 (1962).

13. "The conclusion that no money arbitration award is proper in the case of violations of contract provisions which do not specifically provide for damages would have two effects. The first would be the substitution of some other method of settlement in place of arbitration. The second would be the cluttering up of the contract with a lot of 'liquidated damage' provisions which would invite more trouble than they could ever be expected to prevent." International Harvester Co. v. Farm Equipment Workers Local 104, 9 Lab. Arb. 894, ... (1947) (Wirtz, Arbitrator).

III. Laches.

The most difficult question presented to us for review is the contention that the District Court erred in refusing to consider the Company's claim that the delay in filing some of the grievances and the delay in instituting this action after the Company refused to arbitrate constituted laches which should bar the Union's action for specific performance. The question is difficult because the two circuits that have squarely faced the question have both concluded that laches is an appropriate defense to a suit seeking to compel arbitration of a grievance arising out of a collective bargaining agreement where delay in presenting the grievance has prejudiced the defendant. *Operating Engineers Local 150* v. *Flair Builders, Inc.*, 440 F. 2d 557 (7th Cir. 1971); *Clothing Workers* v. *Ironall Factories Co.*, 386 F. 2d 586 (6th Cir. 1967).[14] Both decisions are based on the same line of reasoning.

> The question before us is whether in a suit to compel arbitration, laches is an equitable defense to be determined by the court or a procedural question to be determined by the arbitrator.
>
> * * * * *
>
> In deciding whether the union, in this case, is barred from prosecuting its cause of action because of its laches, we are not indulging in the judicially unwarranted task of interpreting the collective bargaining agreement. Laches is independent of any procedure

14. What other authority there is on this question consists of conflicting dictum, compare Deaton Truck Line v. Local 612, Teamsters, 314 F. 2d 418, 422 (5th Cir. 1962) with Machinists v. Hayes Corp., 296 F. 2d 238, 244 (5th Cir. 1961), a conclusion that questions of delay must be left to the arbitrator without any discussion of the question. IUE v. Westinghouse Electric Co., 218 F. Supp. 82, 86 (S. D. N. Y. 1963), *aff'd per curiam*, 326 F. 2d 758 (2d Cir. 1964), and a holding that laches was lacking while expressly disclaiming any decision on whether such a defense is appropriate, Local 198, Rubber Workers v. Interco, Inc., 415 F. 2d 1208 (8th Cir. 1969).

> established by the collective bargaining agreement and a decision on laches adds or subtracts nothing from the meaning of the agreement. Furthermore, consideration of the issue in no way involves a consideration of the merits of the underlying substantive issue. The question which the district court considered was whether the Union's delay in requesting arbitration prejudiced [the Company's] rights and defense in this matter. Such question does not involve any matter of contract interpretation and does not bear on the disposition of the underlying dispute, and hence was a proper subject for court consideration.

Clothing Workers v. *Ironall Factories Co.*, 386 F. 2d at 591-92. We think the reasoning of *Flair Builders* and *Ironall Factories* is contrary to the body of federal case law dealing with the enforcement of labor arbitration clauses in collective bargaining agreements that has developed since the decision in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957).

A federal judge deciding a case seeking enforcement of the arbitration clause of a collective bargaining agreement is faced with a delicate task. The duty to arbitrate is contractural and a party should not be compelled to arbitrate that which he has not agreed to arbitrate. *United Steelworkers* v. *Warrier & Gulf Navigation Co.*, 363 U. S. 574, 582 (1960). Thus the judge must determine whether there is an agreement to arbitrate and whether that agreement has been breached. But in deciding those questions that are necessarily his, he must take care to steer clear of the questions that the parties have agreed to settle through the arbitrator. If he does not, he becomes an instrument of a breach of the agreement.

In order to decide whether delay in presenting a grievance or seeking arbitration may appropriately raise the defense of laches in a suit to compel arbitration we must look to the function of laches as a defense to a suit in equity

and to the goals of our national labor laws and the part that arbitration plays in achieving those goals. The primary purpose of our national labor laws is the avoidance of industrial strife. This goal is sought to be achieved by encouraging procedures for the resolution of disagreements without resort to strikes or lock-outs. Everyone loses in a strike.

The alternatives to strike and lock-out are litigation and arbitration. Arbitration is better for two reasons. First, the arbitrator can bring to the resolution of an industrial dispute an expertise and flexibility that most judges will not have. All contracts require interpretation, but labor contracts require more interpretation than others. They must be relatively short in order that their provisions can be generally known by large numbers of people, yet they must encompass all aspects of an extremely complex relationship. Labor agreements, therefore, require lots of gap filling. And the gaps must be filled in a manner suited to implement and smooth the production relationship. The traditional judicial rules of contract construction are too inflexible. "The generalities, the deliberate ambiguities, the gaps, the unforeseen contingencies, and the need for a rule even though the agreement is silent all require a creativeness in contract administration which is quite unlike the attitude of one construing a deed, a promissory note, or a 300-page corporate trust indenture." Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev., 1482, 1493 (1959).[15]

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15. *See also*, Hepburn & Loiseaux, The Nature of the Arbitration Process, 10 Vand. L. Rev. 657, 659 (1957).

> In litigation the parties to a labor agreement are compelled to fit their frequently unique questions into established legal doctrine. A suit for a breach of contract between labor and management must fit traditional patterns, parties must play their proper doctrinal parts, and the court is limited in the type and scope of remedy which it can award. This economically and socially sensitive continuing relationship could not stand the strain if it were necessary to use our historical legal processes to solve every dispute.

Secondly, and perhaps even more importantly, litigation is too slow. Final judgment in a civil action involving factual issues takes an extended period of time, often measured in years. A grievance that remains unresolved over an extended period of time can become a festering sore that eventually leads to a breakdown of the production relationship by a strike. Arbitration, on the other hand, is designed to settle a grievance quickly.[16] For this reason, arbitration is not an alternative to litigation, but is instead an alternative to a strike.[17]

It is possible to view the entire trend of arbitrability decisions such as this as an attempt to limit judicial consideration to those issues that occasion little delay, *i.e.*, those that can be resolved on a motion to dismiss on the pleadings and on the face of the written agreement without the requirement of an evidentiary hearing. Thus in *A. S. Abell Co.* v. *Baltimore Typographical Union No. 12*, 338 F. 2d 190 (4th Cir. 1964), this court concluded that, where the union's claim that the parties did not agree to arbitrate a particular dispute (normally a question for the court) depended on proof of bargaining history (normally requiring an evidentiary hearing), resolution of the question must be left to the arbitrator. The opinion quoted with approval from *IUE* v. *General Electric Co.*, 332 F. 2d 485,

16. "Arbitration offers speed, relative economy, and flexibility. Litigation is unsatisfactory to the parties because of great expense, undesired technicality and delay." Hepburn & Loiseaux, *supra* n. 15.

This case took three years in the District Court from filing to final judgment. The Greenwale grievance, on the other hand, was decided within roughly three months after the parties agreed on an arbitrator.

17. In this case, arbitration is a contractual alternative to strike. See Article 24 of the agreement set out in the Appendix, *infra*. Even if the contract had not contained a no-strike clause, an identical limitation on the right to strike would be implied, Local 174, Teamsters v. Lucas Four Co., 369 U. S. 95 (1962), and be enforceable by injunction, Boys Market v. Retail Clerks Local 770, 398 U. S. 235 (1970).

490 (2d Cir. 1964): "[W]hile this bargaining history may prove very useful to an arbitrator . . . it is of no legitimate use to a court in deciding whether to order the company to submit the grievance to an arbitrator." See also, *Local 24, IBEW* v. *Wm. C. Bloom & Co.*, 242 F. Supp. 421 (D. Md. 1965).

How then does the doctrine of laches fit within this industrial framework? In order for laches to bar a plaintiff's equitable relief, there must be: (1) an unexplained or inexcusable delay in asserting a known right which (2) causes injury or prejudice to the defendant. Not only does resolution of whether the delay in this case is excusable require a factual inquiry and thus the delay attendant to an evidentiary hearing, but it is precisely the same factual inquiry that the arbitrator must engage in to determine whether the Union's failure to comply with the procedural time limits of the contract should bar relief. Judicial resolution of this question is a wasteful duplication of effort. This aspect of a laches defense is "independent of any procedure established by the collective bargaining agreement" only as a matter of semantics. If we were to decide that this issue was appropriate for judicial resolution, the Company would have two chances for a favorable decision on the same issue. This is not only wasteful; it also seems unfair. Moreover, the arbitrator is in the best position to decide it.

The question of prejudice to the Company from the Union's delay lends itself, too, to resolution by an arbitrator rather than by the court. There are two kinds of prejudice which might support a defense of laches: (1) the delay has resulted in the loss of the evidence which would support the defendant's position; or (2) the defendant has changed his position in a way that would not have occurred if the plaintiff had not delayed. The Company claims both

kinds of prejudice. First, the Company asserts that had they known about the claims for retroactive pay prior to the layoffs, their potential $25,000 per month liability would have caused them to arbitrate immediately. Secondly, they assert that in order to determine whether any of the grievants were, in fact, entitled to the requested jobs, one must first determine whether the grievant was able to perform the work, and the best evidence of that ability would be the testimony of the grievant's supervisor, many of whom have since left the Company's employ.[18] But whether a grievant's ability can best be determined by the

18. It is important to note here that the Company is claiming that evidence necessary to support its position on questions to be decided by the arbitrator is lost. If the Company was claiming instead that it had lost the evidence necessary to support its position on questions that are left for judicial decision, *i.e.*, whether the grievance was in fact one which the parties agreed to arbitrate, we would have a different situation, and laches would, we think, be an appropriate judicial issue. The Second Circuit made precisely this distinction in a commercial arbitration case.

> We hold that on a motion to compel arbitration a district court may consider only claims of laches which relate to issues which the court must decide. The arbitrators must resolve any such claims which relate to issues which the parties have agreed to submit to arbitration.
>
> This conclusion is consistent with the policy of the Arbitration Act to eliminate the expense and delay of extended court proceedings preliminary to arbitration, . . . evils which would surely be promoted by a rule which made all questions of laches for the court, especially where a full hearing is required. . . . Moreover, in our view, laches is not a technical legal issue which only a judge is competent to decide. Rather, in the often esoteric field of commercial dealings, and in admiralty, it would seem that the severity of prejudice suffered through delay, and the reasonableness of excuses offered by the dilatory party, the elements of laches, might be resolved better where resort is had to the expertise of the arbitrators.

Trafalgar Shipping Co. v. International Milling Co., 401 F. 2d 568, 572 (2d Cir. 1968). Although that case arose under the terms of the Federal Arbitration Act, we think its reasoning is equally applicable here. *Accord,* Halcon International, Inc. v. Monsanto Australia Limited, 40 U. S. L. W. 2066 (10th Cir. July 7, 1971).

testimony of the grievant's former supervisor or by some other method, and whether it is reasonable to believe the Company's claim that they were not aware of the potential liability for back pay arising out of any of the layoffs requires a greater understanding of the industrial environment from which this case arose than we possess. Not all of the grievances involve the same kind of delay. This is the kind of a case where the arbitrator's creative ability to fashion remedies is especially needed.[19]

We conclude from our examination of the kinds of issues that a laches defense raises that laches is not an appropriate defense in a case such as this seeking to compel arbitration. Accordingly, we remand this case to the District Court with instructions to order arbitration of all

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19. If, for example the Company's hesitancy at assigning women to jobs formerly reserved to males is based on the physical strength requirements of the job rather than technical skill requirements, trying the grievant on the job to see if she could presently do the work might be a more reasonable means of testing her ability than searching the memory of her supervisor. In any event, before we could determine whether the Union's delay resulted in the disappearance of proof, we would have to know what kinds of evidence would be most relevant which would, in turn, require detailed knowledge about the requirements for each of the jobs sought, knowledge which we don't have. Also, the fact that a number of supervisors are no longer in the employ of the Company does not necessarily mean that they could not be located to testify.

The Company's contention that it would have acted differently had they been aware of their potential liability for back pay likewise raises questions that are particularly suited for determination by the arbitrator. The Stanley and Talley grievances were filed prior to the layoff and the agreement specifies that employees unfairly laid off will receive back pay. See note 10, *infra*. Although we do not have the necessary understanding of the industrial framework to decide the question finally, it seems likely that the Company was on notice of the potential liability for back pay at least for those grievances. At the trial, the Company's Director of Labor Relations testified that the reason that the Greenwale grievance was chosen for arbitration rather than one of the other three grievances then filed was because the Greenwale grievance did not involve back pay.

the grievances pressed on appeal without limiting the representative grievances to the individual employee submitting them.[20]

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

20. We add here the caveat that any discussion or resolution of factual issues contained in this opinion or in the opinion of the District Court are for the purpose of determining the question of arbitrability only and are not intended to limit in any way the arbitrator's determination of factual issues necessary to resolve the issues before him.

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Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71–41

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO,

Petitioner,

vs.

FLAIR BUILDERS, INC.,

Respondent.

RESPONSE AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

J. ROBERT MURPHY
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VALLEY INSTANT PRINTING, INC., AURORA, ILLINOIS

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CITATIONS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71–41

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO,

Petitioner,

vs.

FLAIR BUILDERS, INC.,

Respondent.

RESPONSE AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Pursuant to direction of the Court, the Respondent Flair Builders, Inc. responds hereby to the Petition for Writ of Certiorari filed herein by Petitioner International Union of Operating Engineers, Local 150, AFL-CIO.

QUESTION PRESENTED

Does the mere sometime existence of a collective bargaining agreement deprive a federal court of the power to make a threshold determination of whether the arbitration provisions and the agreement itself survived after prolonged laches and abandonment?

STATEMENT OF THE CASE

The Petitioner's Statement contains conclusions directly contrary to the findings of the trial court.

Union relations with the Company during the period 1964-1966 consisted *solely* of the first two-week period. In those two weeks, the Memorandum of Agreement was signed, the employee Rumsey joined the Union, and quit his employment with the Company (App. 86-87). Petitioner's allusion to repeated visits of the Union agent to the Company's construction site makes no mention of the Company ever having knowledge of such visits. Indeed it is undisputed that after the first two weeks, the Union had no contact with the Company during the entire period.

During the period 1967-1968, Petitioner claims two contacts between the Union agent and the Company--in the Spring of 1967 and again in the Spring of 1968. Petitioner's Statement fails to mention that the testimony regarding the first "visit" was impeached (App. 70, 96). Contrary testimony of the President of the Company, placing the first visit in 1968 (App. 90), was found to be the more credible by the District Court (App. 151).

The record below establishes a complete abandonment of any actual communications or other activity between the Union and the Company for a period in excess of four years. On this and other sufficient evidence, both the District Court (App. 149-

151) and the Court of Appeals (Appendix A to Petition for Certiorari) found the Petitioner guilty of laches in bar of judicial enforcement of the arbitration provisions of the Master Agreement.

REASONS FOR DENYING THE WRIT.

I.

THE DECISION OF THE COURT OF APPEALS IS IN FULL CONFORMITY WITH DECISIONS OF THIS COURT.

The Petition for Writ of Certiorari, while supposedly relying on *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 11 L. Ed.2d 898, 84 S.Ct. 909 (1964), is in reality an attempt to override that decision. Petitioner seeks to extend one part of that decision at the expense of its basic premise. Petitioner would cause the abdication of primary judicial responsibility which *Wiley* found imposed on the federal court.

The *Wiley* decision clearly separated two areas of inquiry. The first area, referred to by Mr. Justice Harlan as "the threshold question," is an inquiry whether the arbitration provisions of a collective bargaining agreement *survives*, whether a party is bound to arbitrate, and if so, what issues it must arbitrate. This inquiry is for the court. A second area of inquiry, which the court leaves to arbitration, includes procedural questions growing out of the dispute. These questions *may* involve matters of timeliness as suggested by Petitioner. But only a gross misreading of *Wiley* could conclude that *all* matters involving timeliness are *ipso facto* procedural and arbitrable.

As stated by this Court in *Wiley*, at 376 U.S. at p.547:

> "The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty. Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so *a fortiori*, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all. * * * *
>
> ". . . So too, we do not rule out the possibility that a union might abandon its right to arbitration by failing to make its claim known."

The quotation from *Wiley* appearing on pp. 12-13 of the petition for Writ of Certiorari, we must respectfully point out, is completely out of context. It did *not* refer to questions of delay in seeking arbitration (as Petitioner erroneously suggests), but rather to the omission of certain steps in the grievance procedure.

The decision below properly confined itself to the "threshold question." The District Court and the Court of Appeals found that a four-year abandonment by the Union, a five-year delay in seeking arbitration, and the resulting prejudice to the Company, amounted to laches which effectively barred the obligation to arbitrate.

We must acknowledge the policy priority given to arbitration by many decisions of this Court, as suggested in Petitioner's argument. Industrial peace, however, is not to be achieved by abdication of judicial function in labor law. The underlying assumption is that collective bargaining provides a mutual *quid pro quo*, a union giving up its right to strike in return for an employer's agreement to arbitrate labor disputes. It must be open to serious question whether this creditable policy has any application to such a labor history as indicated by the evidence below. Industrial peace under collective bargaining requires a healthy and active unionism. Petitioner's unionism and bargaining has consisted of five years of neglect and three years of litigation. Petitioner now asks that arbitration be made a weapon, not a tool for the settlement of bona fide labor disputes.

This Court's decision in *The Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 26 L.Ed.2d 199, 90 S.Ct. 1583 (1970), presents no conflict. Mr. Justice Brennan there specifically adopted the dissent in *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 8 L.Ed.2d 440, 82 S.Ct. 1328 (1962), and held that when the District Court issues an anti-strike injunction it must first find that the contract does bind the parties to arbitration.

II.

THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF OTHER COURTS OF APPEAL.

The decisions from the Second, Third, Fifth and Ninth Circuits cited by Petitioner are not in conflict with the decision below.

The question of "laches" referred to in *I. U. E.* v. *Westinghouse Electric Corporation*, 218 F.Supp.82 (S.D.N.Y. 1963), aff'd., 326 F.2d 758 (2d Cir. 1964), was a matter of delay in the prosecution of four specific grievance procedures (four out of twelve, all of which were the subject of constant negotiation between the parties). This was a matter of procedural delays, well outside the scope of the threshold question of whether any conditions existed such as might completely avoid the contractual obligation to arbitrate.

Similarly, *Local Lodge No. 595 of Dist. No. 152* v. *Howe Sound Co. (Inc.)*, 350 F.2d 508 (3rd Cir. 1965), presented a situation of continuing negotiations between the parties on the particular grievance (holiday and vacation pay), neither party having demanded arbitration until suit was filed six months after negotiations broke down. The Court treated the employer's motion to dismiss as a motion to stay the proceedings pending arbitration, holding the matter of "timeliness" as a matter properly to be decided by the arbitrator.

In *United Steelworkers of America* v. *American Int'l. Aluminum Corp.*, 334 F.2d 147 (5th Cir. 1964), cert.denied, 379 U.S. 991 (1965), the employer resisted a Section 301 action to compel arbitration on the ground that a slowdown called by the Union had breached and therefore terminated the collective bargaining agreement. The *Court*, properly, made the determination that the slowdown had *not* had such effect, and that the matters of dispute were still arbitrable. It did not defer the threshold question of breach and release to the arbitrator.

In *Columbian Carbon Co.* v. *IUOE Local No. 405*, 360 F.2d 1018 (5th Cir. 1966), the employer resisted arbitration on the ground that the subject matter of the grievance was outside the scope of the arbitration clause in the contract. The *Court* found that there was no express exclusion of the type of matter from the broad arbitration clause of the contract, leaving the subject matter of the grievance (pay scales of transferred workers) for the arbitrator.

In *Local Union No. 490 United Rubber, C.L.&P. Workers* v. *Kirkhill Rubber Co.*, 367 F.2d 956 (9th Cir. 1966), the company resisted arbitration on the ground that the union had failed to follow the proper procedures in filing its grievance. Such matters being properly within the scope of the arbitrator under *Wiley*, the court ordered arbitration.

The seventh Circuit's own decision in *Local Union No. 51, IBEW* v. *Illinois Power Co.*, 357 F.2d 916 (7th Cir. 1966) is not in conflict. There, grievance procedure was not commenced until 9 months after the problem arose, and the contract called for invoking the procedure within 5 working days. The Court held that whether such failure "waived" the right to invoke the grievance procedure was properly a matter for the arbitrator, as a procedural dispute.

None of the foregoing cases reveals any conflict with the decision from which Petitioner seeks review by certiorari. In fact, the only similar case, from the Sixth Circuit, admittedly supports the decision below. *Amalgamated Clothing Workers* v. *Ironall Factories Co., Inc.* 386 F.2d 586 (6th Cir. 1967).

CONCLUSION

It is respectfully submitted that the Petition shows no special or important reason for granting the writ, that no court of appeals has rendered a decision in conflict with the decision of the court below, and that nothing calls for the exercise of this Honorable Court's power of supervision. Accordingly the Writ of Certiorari ought to be denied.

Respectfully submitted,

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Dated at Aurora, Illinois, October 15, 1971.

ADDENDUM

Respondent has received Petitioner's Supplement to the Petition for Writ of Certiorari, subsequent to preparing the body of Respondent's Response.

While it appears that Judge Craven's dictum in *Tobacco Workers International Union, Local 317* v. *Lorillard Corporation,* _____ F.2d _____ (4th Cir. 1971) is at odds with the decision of the Seventh Circuit in the matter at hand, it clearly appears that the facts and findings in *Tobacco Workers* are well within the area of procedural delays, intrinsic to the grievance procedure and the arbitration coverage. The Seventh Circuit would have reached the same decision on the same facts, applying the approach adopted by Judge Swygert in the matter at hand.

The *Tobacco Workers* accordingly presents no conflict between Circuits. The decision of the Seventh Circuit in *Halcon International, Inc.* v. *Monsanto Australia Limited,* 446 F.2d 156 (7th Cir. 1971) falls in the sphere of commercial arbitration, and is outside the scope of the Labor Management Relations Act policy. It presents no reason for this Court's intervention in the case at hand.

Respectfully submitted,

J. ROBERT MURPHY

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
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BRIEF FOR THE PETITIONER.

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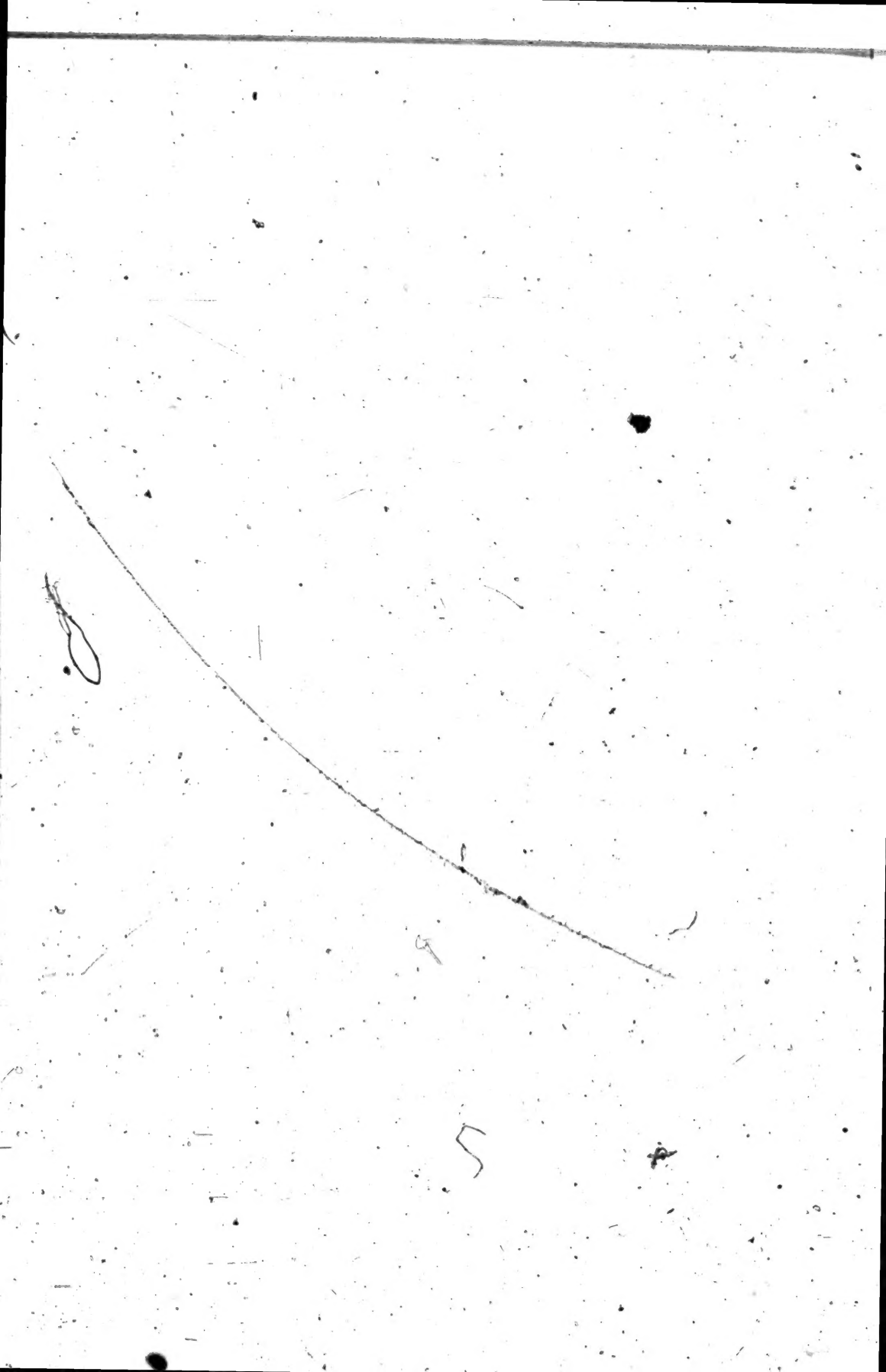

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BRIEF FOR THE PETITIONER.

OPINION BELOW.

The Opinion of the Court of Appeals is reported at 440 F. 2d 557 (7th Cir. 1971) and is presented in its entirety in the Appendix (pages 152 to 160). The Memorandum Opinion of the District Court is reported at ..... F. Supp. ..... (N. D. Ill. 1969), 76 LRRM 2594, and is printed in its entirety in the Appendix (pages 148 to 150).

JURISDICTION.

The judgment of the Court of Appeals was entered on February 5, 1971. Rehearing was denied on April 12, 1971. The Petition for Certiorari was filed on July 8, 1971 and was granted on December 7, 1971. The jurisdiction of this Court rests on 28 U. S. C. § 1254 (1).

QUESTION PRESENTED.

Once a federal court has determined that a dispute is arbitrable under the terms of a collective bargaining agreement, must questions of delay in seeking arbitration such as laches be decided by an arbitrator rather than the federal court?

STATUTE INVOLVED.

The statute involved herein is the Labor-Management Relations Act, 1947, Title III, § 301, 61 Stat. 156, 29 U. S. C. 185(a), as amended, which reads as follows:

TITLE III

SUITS BY AND AGAINST LABOR ORGANIZATIONS

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT.

Nature of the Case.

The Petitioner, International Union of Operating Engineers, Local 150, AFL-CIO (hereinafter referred to as the "Petitioner" or "Union"), initially brought suit in the Federal District Court seeking specific enforcement of its collective bargaining agreement to which the Union and the Respondent, Flair Builders, Inc. (hereinafter referred to as the "Respondent" or "Company"), were parties. The initial complaint was filed on November 7, 1968 and was brought pursuant to Section 301 of the

Labor-Management Relations Act of 1947, as amended (App. 3).

In dismissing the initial complaint, the District Court held that the primary controversy between the parties was whether the agreement executed by the parties constituted a binding collective bargaining agreement (App. 13), and that said dispute should be submitted to arbitration (App. 13).

Thereafter, the Union demanded arbitration (App. 21), which demand was refused by the Company (App. 28).

Accordingly, on June 3, 1969, pursuant to leave of Court, the Union filed its amended complaint requesting the enforcement of its demand for arbitration (App. 15).[1]

The Company thereafter filed a motion to dismiss alleging that the Union was guilty of laches in seeking arbitration (App. 22-23). The District Court denied the Motion to Dismiss and held that laches is a procedural question which should be decided by an arbitrator and not by a federal court (App. 25-26).[2]

---

1. The gravamen of the Amended Complaint set forth the following allegations: 1) the execution of a Memorandum of Agreement by the Company and the Union; 2) the adoption of an existing Master Collective Bargaining Agreement by said Memorandum; 3) the continuing violations by the Company of the provisions of the Agreements; 4) the repeated demands by the Union that the Company adhere to the provisions of the aforementioned Agreements; 5) the Company's refusal to comply with said demands; 6) the holding of the Trial Court that the existence of the Agreement should be submitted to arbitration; 7) the Union's demand for arbitration and the Company's refusal of same (App. 15-18).

2. On the issue of laches, the Trial Court held as follows:

> Defendant also claims that the cause of action is stale and barred by laches. In *John Wiley & Sons* v. *Livingston*, 376 U. S. 543, 557 (1964), the Supreme Court explained that:
>
> > Once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration,

In addition, the Court ordered a hearing for the *limited purpose* of determining whether the parties entered into a binding collective bargaining agreement (App. 26).

The hearing was held on October 24, 1969.

At the hearing the Court attempted to limit the testimony to the question of whether the collective bargaining agreement was executed and contained an agreement to arbitrate. The Court stated and Counsel for the Company agreed that the question of laches was for the arbitrator and not for the Court (App. 90-93).[3]

'procedural' questions [as well as substantive issues] which grow out of the dispute and bear on its final disposition should be left to the arbitrator.

Therefore, if the employer consented to the alleged collective bargaining agreement, the laches issue should be decided by the arbitrator rather than the federal courts (emphasis supplied) (App. 25).

3. In this connection the following statements by the Trial Court and Counsel for the Company at the hearing should be noted:

The Court: . . . I pointed it out very clearly, that if the agreement was executed, if there was an agreement, the question of abandonment is for the arbitrator, along with the other issues in the case (App. 90).

* * * * *

. . . I mean, once the agreement is established, whether you like it or not, and whether I like it or not, I might say, I am bound by what the law provides, and that is that, *the initial agreement says that you submit it to arbitration; that's where it has to go* (emphasis supplied) (App. 91).

* * * * *

The Court: Well, there is a difference of opinion, apparently, as to whether one single thing is done after he was signed up. Mr. Meagher said that he talked to him a couple of times; this witness denies it. Now, you have—but that isn't for me. *That's for the arbitrator* (emphasis supplied) (App. 92).

* * * * *

The Court: I said: . . . "Therefore, if the employer consented to the alleged collective bargaining agreement . . ."—and that the abandonment issue, *the laches issue and the*

Thereafter, the District Court held in a written opinion that the Company was bound by the collective bargaining agreement and accordingly was obligated to arbitrate the dispute (App. 149). However, notwithstanding the limited scope of the hearing and its prior holding that the issue of laches must be decided by an arbitrator, the District Court, nevertheless determined the issue of laches, found the Union guilty of same and dismissed the amended complaint (App. 149-150).

The Seventh Circuit subsequently affirmed the decision of the District Court, Judge Stevens dissenting (App. 152-160).

The Facts:

Collective Bargaining History.[4]

The Union negotiates master collective bargaining agreements with several contractor associations in the State of Illinois (App. 47, 55, 102, 123, Ptf. Exhs. 1 and 3). In addition, the Union enters into individual memoranda of agreement with contractors who are not members of the contractor associations (App. 48, 54, 121-122, Ptf. Exh. 2). Such a memorandum specifically adopts and binds the Union and the non-member contractor to the terms and conditions of a master agreement (App. 121, Ptf. Exh. 2).

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abandonment issue should be decided by the arbitrator rather than by the Court.

Mr. Murphy: Well, *I can agree with the laches* (emphasis supplied) (App. 93).

* * * * *

The Court: The question is whether the agreement to arbitrate ever came into existence. *I hold that it does* (emphasis supplied) (App. 93).

4. At the hearing, the Union presented evidence to establish the existence of the collective bargaining agreements between the parties. In order to demonstrate the existence of these agreements, testimony was elicited and evidence produced relating to the execution of the agreements and the various visits by the Union's business agent to the Company's job sites.

On June 1, 1963, the Union entered into a master collective bargaining agreement (hereinafter referred to as the "Master Agreement"), with various contractor associations covering building construction in Will, Kendall, Grundy, Kane and Kankakee Counties, Illinois (App. 47-48, 102, Ptf. Exh. 1). Thereafter, on May 12, 1964, the Union and the Company, which was not a member of any of these contractor associations, executed a memorandum of agreement (hereinafter referred to as the "Memorandum") (App. 45-46, 48-49, 72, 84, 121, Ptf. Exh. 2). This Memorandum specifically adopted and bound the Company to the terms and conditions of the aforementioned existing Master Agreement (App. 121, Ptf. Exh. 2). In addition, under the terms of the Memorandum, the Company agreed to adopt any additional Master Agreements entered into by the Union and the Fox Valley Contractors Association, one of the signatory contractor associations to the Master Agreement (App. 54, 121, Ptf. Exh. 2).

Union Relations with the Company 1964-1966.

At the time the Memorandum was executed by the parties, the Company employed one Jerry Rumsey to operate equipment covered by the Master Agreement (App. 43-44, 83, 85). Rumsey became a member of the Union on the same day the Memorandum was signed (App. 44, 46, 72). Rumsey did not have enough money to pay the initiation fee and accordingly, Robert V. Richards, the Company President, advanced Rumsey the necessary funds (App. 46, 72, 84). Thereafter, the Union's business agent, Ambrose Meagher, received a number of complaints from Rumsey that he was not being paid the wage scale set forth in the Master Agreement (App. 49-51, 99). Meagher went out to the Company's job site a number of times to investigate the complaints and advised Richards to pay the

correct wage scale (App. 49-51). However, Richards refused to pay the appropriate wage scale and even admitted that he was paying wages which were less than those required by the Master Agreement (App. 49-51). After these numerous attempts to secure his correct wages, Rumsey quit (App. 51, 65, 85-86). Meagher made one more attempt to obtain the full wages for Rumsey after the latter had quit; however, Richards refused to pay same and Rumsey did not press the issue any further (App. 51). At the hearing, Richards admitted that he had not paid the correct wage scale since he had advanced Rumsey's initiation fee and was deducting the fee from Rumsey's wages (App. 99), but denied having any conversations with Meagher about it either while Rumsey was on the job or after he had quit (App. 85-86, 98-99).

After Rumsey quit, the Company subcontracted certain excavating work to another employer (App. 52, 87-88). During the summer of 1964, Meagher visited the job site several times, observed this subcontractor performing the excavating work and had some conversations with him (App. 52). Accordingly, the Union had no complaints in regard to its Agreement with the Company during this period since the excavating work covered by that Agreement was being performed by the subcontractor and not by the Company (App. 52).

In 1965 and 1966, Meagher, the Union's business representative, again made a number of visits to the Company's construction site (App. 52-53). He observed the subcontractor performing excavation work and had various conversations with him and accordingly had no contract disputes to take up with the Company (App. 52-54, 92, 94, 97-98).

Richards testified that during 1965 some of his non-union employees operated equipment which came within the scope of the Master Agreement (App. 87-88).

The New Master Collective Bargaining Agreement—1966.

On June 1, 1966, the Union and the aforementioned contractor associations entered into a new Master Collective Bargaining Agreement (hereinafter referred to as the "New Master Agreement") (App. 54-55, 123, Ptf. Exh. 3). Under the terms of the existing Memorandum and specifically paragraph 3 therein, the Union and the Company had agreed to adopt the terms and conditions of any new Master Agreement entered into between the Union and the Fox Valley Contractors Association unless either party gave notice of termination (App. 121-122, Ptf. Exh. 2). In order to terminate the Memorandum, either party was required to give notice of termination at least three calendar months prior to the expiration of the existing Master Agreement (App. 121-122, Ptf. Exh. 2). However, neither party terminated the Memorandum and accordingly, both parties became bound to the new Master Agreement (App. 54-55).

During the winter of 1966-1967, Meagher visited the construction site a few times and observed that the job had been shut down (App. 56).

Union Relations with the Company—1967-1968.

1967—The Company's Attempt to Avoid the Union Security Provision as Well as the Entire New Master Agreement.

In the Spring of 1967, Meagher received a complaint that a non-union man was operating equipment on the Company's construction site. Meagher investigated the complaint, spoke with the non-union employee and told Richards that the employee was required to join the Union pursuant to the union security provision of the New Master Agreement (App. 56-57, 67-69). However, Richards refused to cooperate (App. 57).

Thereafter, Meagher visited the job site on several occasions and each time he observed a different non-union employee operating equipment (App. 58-59, 67-68, 98). Meagher contacted Richards each time and explained that employees covered by the New Master Agreement were required to join the Union; however, Richards refused to comply with the terms of the New Master Agreement (App. 58-59, 98).

Finally, in the Fall of 1967, Meagher again warned Richards that he was required to live up to the terms of the New Master Agreement, and Richards replied that he was never going to abide by the New Master Agreement and threatened to have Meagher arrested (App. 59). Richards, at the hearing, denied any conversations with Meagher during 1967 (App. 94, 97-98).[5]

During the winter of 1967-1968 Meagher visited the job site a few times and observed no activity on the site (App. 59).

1968.

In June, 1968, Meagher visited the job site and discovered another non-union employee, one Floyd Schimmelpfennig, operating equipment (App. 60, 68). Meagher and Schimmelpfennig had a conversation, the result of which was that the latter decided to join the Union (App. 60-61, 69-70). Shortly thereafter, in July, Schimmelpfennig joined the Union, and Meagher went to the job site and told Richards

5. In addition to Richards, the Company called Richards' brother, Thomas Stanley Richards, a foreman for the Company, as a witness (App. 77). Initially, the foreman attempted to convey the impression that no one from the Union had visited the Company's job site prior to 1969 (App. 77-78). However, when pressed on cross-examination, this witness admitted that he was not always on the job site and further that representatives of the Union might have visited the Company's office which was located off the job site (App. 80-81).

he would have to abide by the terms of the New Master Agreement in regard to Schimmelpfennig's employment (App. 61, 94). Richards refused to abide by the New Master Agreement, stated that he did not believe in the Union and that he was not going to pay the union wage scale (App. 61, 94). Schimmelpfennig did not receive the union scale, and accordingly, a week later, Meagher and William Anderson, another business representative of the Union, visited the job site and demanded that Richards pay the correct wages (App. 62, 75-76, 94-95, 98). Richards again refused to pay the wages in accordance with the scale set forth in the New Master Agreement (App. 62, 75).

Subsequently, the Union filed a complaint with the Wage and Hour Division of the Department of Labor on behalf of Schimmelpfennig for back wages (App. 63). The wage and hour complaint was substantiated in favor of Schimmelpfennig (App. 63). Thereafter, the Company discharged Schimmelpfennig, and an unfair labor practice charge was filed against the Company with the National Labor Relations Board (App. 63). As a result, Schimmelpfennig received back pay and was offered reinstatement as part of a settlement agreement between the Labor Board and the Company (App. 63).

Thereafter, the Union filed suit to enforce its collective bargaining agreement (App. 62-63).

ARGUMENT.

Once a Federal Court Determines That a Dispute Is Arbitrable Under the Terms of a Collective Bargaining Agreement, the Issue of Delay in Seeking Arbitration Is for an Arbitrator Rather Than the Federal Court.

In the instant case, the District Court, in its opinion ordering the hearing on the issue of arbitrability, held that that the question of laches was for the arbitrator and not for the court. In this regard the District Court relied on this Court's decision in *John Wiley & Sons* v. *Livingston*, 376 U. S. 543 (1964). At the hearing, the Court reiterated its position that the issue of laches was for the arbitrator, and Counsel for the Company agreed. At this point in the litigation it did not appear that there was any dispute on the very issue which is now before this Court.

Subsequent to the conclusion of the hearing on arbitrability, the District Court rendered a written opinion in which it found that the Company was bound by the collective bargaining agreement to arbitrate. However, the Court then totally reversed its position on the issue of laches and made a determination of same which was adverse to the Union.

On appeal, the Seventh Circuit affirmed the decision of the District Court, Judge Stevens dissenting. The Majority opinion relied primarily on the previous decision of the Sixth Circuit in *Amalgamated Clothing Workers* v. *Ironall Factories, Co.*, 386 F. 2d 586 (6th Cir. 1967). Thereafter, the Court of Appeals for the Fourth Circuit in *Tobacco Workers, Local 317* v. *Lorillard Corp.*, 448 F. 2d 949 (4th Cir. 1971), held that laches was an issue for the arbitrator and that the opinion of the Seventh Circuit was incorrect.

Accordingly, the question presented in the instant case is what is the appropriate forum to determine the issue of laches where it has been found by the federal court that the parties have agreed to submit all differences and disputes under the terms of the contract to an arbitrator.

In order to determine this question, we must first look to the development of the federal common labor law fashioned by the federal courts pursuant to Section 301 of the National Labor Relations Act. This Court has fashioned a federal common law which limits the role of the federal court and concurrently expands the role of arbitration in labor disputes. The policy underlying this development in the law is to promote industrial peace by establishing arbitration as the central institution for the resolution of disputes between labor and management. *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957); *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U. S. 235 (1970). Another basic policy consideration is the union's *quid pro quo* in giving up its right to strike for the efficient and effective resolution of disputes through the arbitration process. *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 (1962). Accordingly, this Court further expanded these considerations in the *Steelworkers Trilogy*[6] and limited the role of the federal courts in determining arbitrability to the threshold question of whether there exists a collective bargaining agreement and whether the language of that agreement is sufficiently broad to require the submission of the dispute to arbitration. As this Court stated:

> . . . The function of the court is *very limited* when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to *ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract.* Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should-

> not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for. (363 U. S. at 567-568.) (Emphasis supplied.)

In the instant case the determination of the threshold question of arbitrability was found in favor of the Union by the District Court and was not contested in the Court of Appeals.

Subsequent to the *Steelworkers Trilogy*, the question of whether a federal court should also determine issues of delay in seeking arbitration was raised in *John Wiley & Sons, Inc.* v. *Livingston, supra.* In that case, this Court held that the specific question of delay must be decided by the arbitrator and not the federal court as follows:

> Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator. . . . (376 U. S. at 557.)

The Court based its decision on several important policy considerations. They were (1) that the question of delay cannot ordinarily be answered without a consideration of the merits of the dispute which has been presented for arbitration;[7] (2) that delay would necessarily result from

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6. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

7. As the Court stated:

> Doubt whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or *whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration.* . . . (376 U. S. at 557) (Emphasis supplied)

judicial proceedings prior to the arbitration as well as (3) duplication of effort, and (4) increased costs.[8]

Let us then apply these policy considerations to the defense of laches as raised in the instant case.

Laches is an equitable doctrine which basically provides that, to bar a plaintiff's equitable relief there must be:

1. an unexplained or unexcusable delay in asserting a known right which
2. causes injury or prejudice to the defendant. *Hoehn v. Crews*, 144 F. 2d 665 (10th Cir. 1944), *cert denied*, 323 U. S. 773; *Tobacco Workers, supra.*

In the first instance, the question of whether delay in a case is excusable and has not prejudiced the defendant requires a factual inquiry. Questions such as whether the requirements of the arbitration clause need be followed where there has been a continuing violation by the employer of the entire agreement or whether compliance with the agreement was excused because it would have been a vain and useless act in view of the employer's express attitude that

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8. The Court's language in regard to considerations 2, 3 and 4, was as follows:

> . . . Reservation of "procedural" issues for the courts would thus not only create the difficult task of separating related issues, but *would also produce frequent duplication of effort.* . . . (376 U. S. at 558) (Emphasis supplied.)
>
> * * * * *
>
> While the courts have the task of determining "substantive arbitrability," there will be cases in which arbitrability of the subject matter is unquestioned but a dispute arises over the procedures to be followed. In all of such cases, acceptance of Wiley's position *would produce the delay attendant upon judicial proceedings preliminary to arbitration.* As this case, commenced in January 1962 and not yet committed to arbitration, well illustrates, *such delay may entirely eliminate the prospect of a speedy arbitrated settlement of the dispute, to the disadvantage of the parties (who, in addition, will have to bear increased costs) and contrary to the aims of national labor policy.* (376 U. S. at 558) (Emphasis supplied.)

there was no contract or whether there was a custom or practice to waive strict compliance with requirements under such circumstances all relate to a full and complete hearing on the merits. In fact, in the instant case the precise nature of the inter-relationship between the issue of delay raised by the defense of laches and the merits of the entire dispute was placed in its most direct perspective in the dissenting opinion of Judge Stevens below wherein he stated:

> The appropriateness of laches as a defense to a labor dispute involves a consideration of several questions which can best be answered by one who is familiar with the collective bargaining relationship between the parties. Although the trial court stated that the defense of the union's charges would impose an "extreme burden" on Flair, the record does not answer these questions: Does the area-wide master agreement contemplate that a small employer like Flair shall have the burden of full compliance with its terms? Would routine records ordinarily retained by employers disclose the information on which Flair relies to justify its disregard of its written undertakings? Was the lack of communication between the union and Flair entirely the fault of the union? Even if it was too late in 1968 for the union to question Flair's breaches in 1964 and 1965, was it also too late to ask a neutral third party to pass judgment on 1966 and 1967 breaches, as well as a continuing refusal to abide by the agreement?
>
> *The task of answering questions such as these—determining whether the union's delay was unreasonable and whether Flair's defense has been significantly prejudiced by that delay—inevitably involves a consideration of the merits of the underlying dispute between the parties. This task should, therefore, be performed by the arbiter who is also responsible for deciding the merits of the basic controversy.* (App. 159-160) (440 F. 2d at 561) (Emphasis supplied:)

Moreover, it must be remembered that in the instant case, the District Court had already decided that the issue of laches was for the arbitrator when it ordered a hearing limited to the question of whether there was a binding agreement requiring arbitration. Therefore, the entire tenor of the hearing was geared to determining the question of the existence of the collective bargaining agreement—arbitrability—and not the question of laches.[9]

Secondly, the resolution of laches by a federal court requires untold delay in bringing the matter to final resolution. Indeed, this is best illustrated by the instant matter. This case was initiated over three years ago and could have been resolved long ago in arbitration had the defense of laches been determined by an arbitrator. Instead, the District Court determined the issues of laches, an appeal was taken and the case is still pending before this Court. Obviously, lengthy delays must result since there are no precise benchmarks for determining laches and each case will have to be decided by the federal court on its own facts.

Moreover, there is also the duplication which this Court referred to in *Wiley, supra.* Had the District Court held against the Company on the issue of laches, the Company could still have attempted to have the issue determined by the arbitrator as part of the hearing on the merits of the dispute. This very consideration was recently underscored by the Fourth Circuit in its decision in *Tobacco Workers, supra,* wherein it stated:

> Not only does the resolution of whether the delay in this case is excusable require a factual inquiry and thus the delay attendant to an evidentiary hearing, but it is precisely the same factual inquiry that the arbitrator must engage in to determine whether the Union's failure to comply with the procedural time

9. In this regard there was no evidence presented on an essential element of laches namely: prejudice to the Company. See *Tobacco Workers, supra,* 448 F. 2d at 958-959.

> limits of the contract should bar relief. Judicial resolution of this question is a wasteful duplication of effort. This aspect of a laches defense is "independent of any procedure established by the collective bargaining agreement" only as a matter of semantics. If we were to decide that this issue was appropriate for judicial resolution, the company would have two chances for a favorable decision on the same issue. This is not only wasteful; it also seems unfair. Moreover, the arbitrator is in the best position to decide it. (448 F. 2d at 958.)

The final consideration stated by this Court in *Wiley*, was "increased costs." This again is best illustrated by the instant case. On January 12, 1972, Counsel for the Company advised this Court, "We must regretfully advise that due to the straitened financial conditions of our client we will be unable to file an answering brief, make oral argument, or otherwise appear in the above entitled matter." It is submitted that the three years of delay, costs incurred, and expensive litigation in the federal courts must be measured against the efficient and effective system of arbitration which is provided for in the collective bargaining agreement.

These considerations must also be measured against the unique role of arbitrators in labor-management disputes. In the first instance, a labor arbitrator normally brings to the resolution of an industrial dispute the expertise and flexibility that most judges do not have. It is obviously not a question of intellectual superiority but rather the plain fact that the grievance and arbitration procedure concerns the daily relationships of management and labor and is part of the contract which would benefit from interpretation by the arbitrator who has specialized knowledge in the field. As this Court has stated in *Warrior & Gulf*, *supra*:

> The labor arbitrator performs functions which are not normal to the courts; the considerations which help

> him fashion judgments may indeed be foreign to the competence of the courts. . . . *The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop*—is equally a part of the collective bargaining agreement although not expressed in it. *The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment.* (363 U. S., at 581-582) (Emphasis supplied.)

Moreover, while contracts generally require interpretation, labor contracts require more interpretation or gap-filling than others. Labor agreements in which we are dealing with a continuing relationship between management and labor naturally produce unforeseen contingencies and problems which were not contemplated at the time the contract was executed. *Warrior & Gulf*, 363 U. S. at 578-580. As pointed out by the Fourth Circuit in its recent opinion in *Tobacco Workers*, *supra*:

> Labor agreements, therefore, require lots of gap filling. And the gaps must be filled in a manner suited to implement and smooth the production relationship. The traditional judicial rules of contract construction are too inflexible. "The generalities, the deliberate ambiguities, the gaps, the unforeseen contingencies, and the need for a rule even though the agreement is silent all require a creativeness in contract administration which is quite unlike the attitude of one construing a deed, a promissory note, or a 300-page corporate trust indenture." (448 F. 2d at 957.)

In light of the above, let us now review the decision of the Court of Appeals below as well as decisions on which it relied.

The Majority opinion of the Court below held that a federal court can go beyond determining the issue of arbitrability and determine defenses relating to a delay in seeking arbitration—laches. In taking this position, the Majority made no mention of the fundamental decisions of this Court limiting the role of the federal courts in *Textile Workers, supra; Steelworkers Trilogy, supra*; and *Boy's Markets, supra.* The only decision of this Court to which the Majority below addressed itself was *Wiley, supra.* However, in doing so that Majority cited *Wiley* as holding that *only* questions involving the technical compliance with the time limitations of a grievance procedure may be submitted to an arbitrator and that questions of delay in seeking arbitration such as laches may be determined by a federal court.

It is submitted that this was not the holding in *Wiley.* The facts in *Wiley* clearly demonstrate that the union therein never resorted to any grievance procedure but instead sought arbitration in the federal court. Accordingly, the issue of delay in *Wiley* bore no relationship to the technical compliance with the time limitations of the grievance procedure, but rather related to whether the union was guilty of delay in seeking arbitration in the federal court. Moreover, this Court in *Wiley* expressly held that questions relating to whether grievance procedures are followed, whether such procedures apply to a particular dispute, or "whether the unexcused failure to follow them avoids the duty to arbitrate" must be decided by an arbitrator since all of these questions involve consideration of the merits of the dispute. 376 U. S. at 557.

In addition, the Court below, in an attempt to justify its holding, engaged in semantic gymnastics by utilizing such terms as "intrinsic" and "extrinsic" and relied upon *Amalgamated Clothing Workers* v. *Ironall Factories, Inc.*,

386 F. 2d 586 (6th Cir. 1967).[10] In both cases, these Circuits attempted to say that laches was separate and apart from the contract, and therefore, that issue is not to be determined by the arbitrator. Oddly enough, when the Seventh Circuit had been previously confronted with an issue of delay which had been raised as an affirmative defense and which had been labeled as "waiver" rather than "laches," that Court, relying on *Wiley*, held that the delay issue was a question for the arbitrator. *Local 51, Int'l. Brotherhood of Electrical Workers* v. *Illinois Power Co.*, 357 F. 2d 916 (7th Cir. 1966), *cert. denied*, 385 U. S. 850.[11]

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10. The other authority regarding the issue of laches consists of *IUE* v. *Westinghouse Electric Co.*, 218 F. Supp. 82, 86 (S. D. N. Y. 1963), *aff'd per curiam*, 326 F. 2d 758 (2d Cir. 1964) in which the District Court, relying on the Second Circuit's decision in *Wiley*, held that the question of laches is for the arbitrator.

In addition, *Local 198, Rubber Workers* v. *Intereo, Inc.*, 415 F. 2d 1208 (8th Cir. 1969) held that laches was lacking while expressly disclaiming any decision on whether such a defense can be determined by a federal court. Also compare two cases decided prior to this Court's decision in *Wiley*: *Deaton Truck Line* v. *Local 612, Teamsters*, 314 F. 2d 418, 422 (5th Cir. 1962) and *Machinists* v. *Hayes Corp.*, 296 F. 2d 238, 244 (5th Cir. 1961) which concluded that questions of delay must be left to an arbitrator without any discussion of the issue.

11. *Illinois Power, supra*, involved a union which waited nine months after a dispute had arisen before it filed a grievance. The company raised the affirmative defense of waiver, and the Seventh Circuit held that under the *Wiley* doctrine, the issue of waiver must be decided by an arbitrator and not a federal court. See also the Seventh Circuit opinions in *Local 1101, Retail Clerks Int'l. Ass'n.* v. *Woodman's Food Market, Inc.*, 371 F. 2d 199 (7th Cir. 1966) and *Mogge* v. *Dist. 8 Int'l Assn. of Machinists*, 387 F. 2d 880 (7th Cir. 1968), *cert. denied*, 391 U. S. 936.

In addition: other circuits have relied upon *Wiley* in holding that questions of delay in seeking arbitration are for the arbitrator rather than the federal court. See *Local 595, Dist. 152* v. *Howe Sound Co.*, 350 F. 2d 508 (3rd Cir. 1965); *United Steelworkers of America* v. *American Int'l Aluminum Corp.*, 334 F. 2d 147 (5th Cir. 1964), *cert. denied*, 379 U. S. 991 (1965); *Local 190, Rubber Workers* v. *Kirkhill Rubber Co.*, 367 F. 2d 956 (9th Cir. 1966).

It is submitted that in terms of raising a defense of delay to a suit seeking arbitration, there is no substantive difference between laches and waiver other than a matter of semantics. Whether one labels the defense of delay as "laches," "waiver," or "procedural timeliness," a resolution of such a defense necessarily involves a determination of the merits of the dispute and bears directly upon the outcome and is accordingly for an arbitrator and not the federal court to decide.

Indeed, the fallacy of the semantic distinction by the Majority in *Flair* was aptly pointed out by the Fourth Circuit in *Tobacco Workers, supra,* wherein that Court, in rejecting the reasoning of the Majority opinion below, as well as *Ironall, supra,* stated as follows:

> This aspect of a laches defense is "independent of any procedure established by the collective bargaining agreement" only as a matter of semantics. (448 F. 2d at 958)

See also *Rochester Telephone Corp.* v. *Communication Workers of America,* 340 F. 2d 237, 238-239 (2d Cir. 1965). to its most recent decision in *Boy's Markets, supra.*

In addition, the reasoning of the Majority below has generated confusion in the Seventh Circuit as most recently highlighted in *Halcon Int'l. Inc.* v. *Monsanto-Australia Ltd.,* 446 F. 2d 156 (7th Cir. 1971), *cert. denied,* ..... U. S. ....., 92 S. Ct. 286 (1971). That case involved commercial arbitration, and the Court in another divided opinion held that, the defense of laches must be determined by an arbitrator rather than by the federal court. In that opinion, the Majority attempted to distinguish its decision from its opinion in *Flair* on the basis of the "intrinsic" and "extrinsic" concept. However, in the dissent in *Halcon,* Judge Swygert, who wrote the Majority opinion in the case below, stated that the "principles defining the respective spheres of jurisdiction between the courts and arbitrators" regard-

ing the decision of laches are the same in both *Flair* and *Halcon*, and accordingly the issue of laches should have been decided by the court in *Halcon*.

Thus, the confusion that is reigning in the Seventh Circuit is most illustrative as to why the issue of delay—irrespective of its label—should be decided by an arbitrator rather than by a federal court.

In addition, it is submitted that if a federal court is allowed to consider laches in determining arbitrability, a veritable Pandora's Box would be opened since defendants would then be able to raise other affirmative defenses allowed under Rule 8(c) of the Federal Rules of Civil Procedure such as waiver, duress and estoppel.[12] Accordingly, the process of arbitration would become a languid and inefficient method for resolving labor disputes and its hallmark will be delay and duplication rather than efficiency and effectiveness.

Finally, from a union's point of view, the consideration for giving up its right to strike is the agreement to arbitrate labor disputes. As this Court pointed out in *Textile Workers, supra:*

> Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way. (353 U. S. at 455).

Once the availability of arbitration is removed from the context of a labor dispute, the consideration for maintaining industrial peace is effectively eliminated. Accordingly, it is submitted that a party who is subjected to extensive litigation over the determination of delay questions

12 Fed. R. Civ. P. 8(c).

such as laches may well resort to an alternative in the form of self-help—a strike or a lockout—to resolve the dispute. Obviously, this is precisely the consequence which this Court has steadfastly sought to avoid in its development of federal labor policy from *Textile Workers, supra*, to its most recent decision in *Boy's Markets, supra*.

For this reason, arbitration is not an alternative to litigation but is rather an alternative to a strike or lockout.

Suffice it to say, where the parties have agreed to arbitration pursuant to a collective bargaining agreement, the federal court should not determine issues of delay including laches, but rather it should be determined by the arbitrator if labor arbitration is to remain a viable and effective method for resolving labor disputes and maintaining industrial peace.

CONCLUSION.

For the reasons stated herein it is respectfully requested that judgment of the Court of Appeals below be reversed and that this Court order that the complaint for arbitration be enforced and that the Company be directed to submit the matter to arbitration.

Respectfully submitted,

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Dated at Chicago, January 19, 1972.

Syllabus

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO *v.* FLAIR BUILDERS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 71-41. Argued April 10, 1972—Decided May 30, 1972

Petitioner union brought an action in June 1968 seeking damages and injunctive relief for respondent's alleged breach of their collective-bargaining agreement, charging that respondent had "continually violated" the contract since June 1966 by refusing to abide by any of its terms. The agreement provided for arbitration "of any difference . . . which cannot be settled . . . within 48 hours of the occurrence." The District Court held that respondent "was bound by the memorandum agreement to arbitrate labor disputes within the limits of the arbitration clause," but found the union guilty of laches and dismissed the action. The Court of Appeals affirmed. *Held:* As the District Court found, the parties did agree to arbitrate and, the existence and scope of an arbitration clause, being matters for judicial decision, the phrase "any difference" encompasses the issue of laches within the broad sweep of its arbitration coverage. Pp. 490–492.

440 F. 2d 557, reversed.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. POWELL, J., filed a dissenting opinon, in which BURGER, C. J., joined, *post*, p. 492.

Bernard M. Baum argued the cause for petitioner. With him on the brief were *Daniel S. Shulman* and *Robert H. Baum.*

J. Robert Murphy, by invitation of the Court, 405 U. S. 972, argued the cause and filed a brief as *amicus curiae* in support of the judgment below.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

In November 1968, petitioner brought an action in the United States District Court for the Northern District of Illinois, seeking damages and injunctive relief for an alleged breach by respondent of their collective-bargaining agreement. The complaint charged that since June 1, 1966, respondent had "continually violated" the contract by refusing to abide by any of its terms, including wage, hiring hall, and fringe benefit provisions. The agreement, which incorporated the terms of master contracts between petitioner and a local contractors' association, provided for arbitration of "any difference . . . between the parties hereto which cannot be settled by their representatives, within 48 hours of the occurrence."

The District Court dismissed petitioner's action for failure to state a claim and noted, but did not pass upon, two additional contentions of the company—"that (1) no contract was ever created, and (2) . . . if consummated, the agreement was subsequently abandoned by the union." No. 68–C–2091 (April 14, 1969) (unreported). The court suggested that the parties arbitrate the binding effect of their contract. When the company refused to arbitrate either that issue or "the subsequent issues of possible violations," petitioner filed an amended complaint to compel arbitration.

In moving to dismiss the amended complaint, respondent again denied the existence of a binding agreement and argued that the Union's delay in seeking arbitration constituted laches barring enforcement of the contract. The District Court initially denied the motion, holding that "if the employer consented to the alleged collective bargaining agreement, the laches issue should be decided by the arbitrator rather than the federal courts." *Id.* (Aug. 26, 1969). But after conducting an evidentiary hearing on the scope of the ar-

bitration clause, the court entered an order dismissing the complaint. *Id.* (Dec. 4, 1969) (unreported). Though agreeing that respondent "was bound by the memorandum agreement to arbitrate labor disputes within the limits of the arbitration clause," the court found that there had been no contact between the parties from the time of the signing in 1964 until the summer of 1968. It therefore concluded that the Union was guilty of laches in seeking enforcement:

> "The master agreement contemplates initiation of arbitration proceedings if any dispute is not settled within 48 hours of its occurrence, and further provides that the Board of Arbitrators shall meet 'within six (6) days.' Yet demand for arbitration was not made in this case until April, 1969, almost five years from Flair's first alleged failure to comply with the contract and nearly three years from the inception of the alleged breach sought to be arbitrated.
>
> . . . . .
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> "To require Flair to respond, through arbitration, to general charges of noncompliance with contract provisions allegedly beginning more than two years before this suit was filed would impose an extreme burden on its defense efforts. . . . [T]o compel arbitration would reward plaintiff for its own inaction and subject defendant to the risk of liability because of actions taken or not taken in reliance on plaintiff's apparent abandonment."

The Court of Appeals affirmed the order by divided vote. 440 F. 2d 557 (1971). Its opinion read the memorandum of the District Court to hold that the collective-bargaining agreement was still in effect and that therefore the question for decision was "whether a court may properly dismiss the complaint on the basis of laches resulting from dilatory notification of the exist-

ence of a dispute in a suit brought to compel arbitration with regard to the dispute." *Id.*, at 557–558. The court then addressed this Court's decision in *John Wiley & Sons* v. *Livingston*, 376 U. S. 543 (1964). There an employer refused to arbitrate on the ground that the union, among other things, had failed to follow grievance procedures required by the collective-bargaining agreement. We ordered arbitration, holding that "[o]nce it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *Id.*, at 557. The Court of Appeals distinguished *Wiley* on the ground that the procedural question there concerned "intrinsic" untimeliness, relating solely to the requirements of the contract. Here, on the other hand, the question was one of "extrinsic" untimeliness, based not on a violation of contract procedures but on the failure to give timely notice under the equitable doctrine of laches. Therefore, according to the court, the matter was within its province to decide, for "'we are not indulging in the judicially unwarranted task of interpreting the collective bargaining agreement.'" 440 F. 2d, at 560, quoting *Amalgamated Clothing Workers* v. *Ironall Factories Co.*, 386 F. 2d 586, 591 (CA6 1967). We granted certiorari. 404 U. S. 982 (1971).

Petitioner contends that the Court of Appeals erred in limiting *Wiley* to cases of "intrinsic" delay because the issue of delay, whether "intrinsic" or not, "necessarily involves a determination of the merits of the dispute and bears directly upon the outcome and is accordingly for an arbitrator and not the federal court to decide." Brief for Petitioner 21. In other words, petitioner argues that even if the parties have not agreed to arbitrate the laches issue, *Wiley* requires that the arbitrator resolve

the question as an integral part of the underlying contract dispute.

We need not reach the question posed by petitioner, for we find that the parties did in fact agree to arbitrate the issue of laches here. Although respondent denies that it ever signed a binding contract with petitioner, the District Court found to the contrary and held that the company "was bound by the memorandum agreement to arbitrate labor disputes within the limits of the arbitration clause." That clause applies to "any difference," whatever it may be, not settled by the parties within 48 hours of occurrence. There is nothing to limit the sweep of this language or to except any dispute or class of disputes from arbitration. In that circumstance, we must conclude that the parties meant what they said—that "any difference," which would include the issue of laches raised by respondent at trial, should be referred to the arbitrator for decision.* The District Court ignored the plain meaning of the clause in deciding that issue.

Of course, nothing we say here diminishes the responsibility of a court to determine whether a union and employer have agreed to arbitration. That issue, as well as the scope of the arbitration clause, remains a matter for judicial decision. See *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 241 (1962). But once a court finds that, as here, the parties are subject to an agreement to arbitrate, and that agreement extends to "any difference" between them, then a claim that

*Respondent's attorney admitted as much in the hearing before the District Court. Though contending that the binding effect of the contract was an issue for the court, and not the arbitrator, he agreed that "laches is another thing. I can go along on this being an arbitrable question, I suppose, if you have got a contract . . . ." App. 93.

particular grievances are barred by laches is an arbitrable question under the agreement. Compare *Iowa Beef Packers, Inc.* v. *Thompson*, 405 U. S. 228 (1972). Having agreed to the broad clause, the company is obliged to submit its laches defense, even if "extrinsic," to the arbitral process. The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, dissenting.

Through the exercise of formal logic the majority reaches a result that I believe is unjust. A full statement of the facts is necessary to put this case in proper perspective. Flair Builders, Inc. (Flair), is a small independent construction firm. The International Union of Operating Engineers, Local 150, AFL–CIO (the Union), had a master collective-bargaining agreement in effect with many contractor associations in Flair's area. On May 12, 1964, the Union and Flair signed a memorandum agreement which adopted the terms of the then-existing master bargaining agreement. The memorandum provided that Flair would be bound by any future master agreement entered between the Union and the contractor associations. Flair had *only one* employee at the time it signed the memorandum agreement with the Union. This employee joined the Union, but left Flair's employment about two weeks later. His job was filled successively by employees who operated the only piece of equipment owned by Flair. None of these successor employees belonged to the Union.

In the ensuing years, Flair prospered and added a modest amount of additional equipment. By 1967 it owned four pieces. Throughout the period from May 1964 until the summer of 1968, Flair operated all of its equipment with nonunion employees. During this period of more

than four years, Flair heard nothing whatever from the Union.

In 1966, without Flair's knowledge, the Union and the contractor associations entered into a new master agreement which contained a provision that: "Should any difference arise between the parties hereto which cannot be settled by their representatives, within 48 hours of the occurrence, such difference shall be submitted to arbitration." It further provided that the arbitrators should meet within six days after it was determined that the dispute could not be settled. Although Flair was not a party to the new 1966 master agreement, and received no notice of its execution from the Union, the District Court determined that Flair was "bound" by virtue of the incorporation provision in the memorandum agreement signed in 1964.

It is apparent that the Union either forgot about its 1964 agreement with Flair or considered Flair's small operation to be of no consequence. For a long time everyone seemed happy, and things went well. Then in June 1968, *four years* after the agreement was entered, a Union business agent visited Flair. This was the first such visit since May 1964. The business agent found that Flair's four employees were nonunion, and he also complained about their wages. Flair refused to recognize any obligation to the Union.

After the lapse of another five months, on November 7, 1968, the Union filed a complaint against Flair in the District Court seeking specific performance of the alleged collective-bargaining agreement and monetary damages in the amount of $100,000. Flair's motion to dismiss for failure to state a cause of action was sustained by the District Court on April 14, 1969, in a memorandum opinion which suggested that the parties arbitrate their differences. Pursuant to leave of court, the Union filed an amended complaint on June 3, 1969, alleging that on

April 18, 1969, the Union had demanded "immediate arbitration" and that Flair had refused. In its answer to the amended complaint, Flair asserted various defenses, including abandonment of the contract and laches in asserting "any purported rights or claims thereunder."

After an evidentiary hearing, the District Court concluded that the Union had been "guilty of laches by its unjustified delay in the enforcement of its contract with defendant," and dismissed the complaint. The Court of Appeals for the Seventh Circuit, with one judge dissenting, agreed that laches was a bar to the Union's belated assertion of the right to arbitrate, and affirmed the judgment of the District Court.

In its opinion today, the Court looks solely at the clause in the master collective-bargaining agreement which provided for arbitration of "any difference" between the parties, and holds:

> "[T]hat the parties meant what they said—that 'any difference,' which would include the issue of laches raised by respondent at trial, should be referred to the arbitrator for decision." [1]

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[1] It should be noted that this language was added to the master contract in 1966 without the knowledge of Flair, at a time when it had every reason to believe that the Union—from which it had heard nothing for more than two years—had abandoned the initial memorandum agreement of May 12, 1964. Flair had no union employees, and had received no demands or notices of any kind from the Union. But whatever the situation may have been in 1966, the subsequent history of this remarkable performance corroborates the view that neither Flair nor the Union was conscious of the existence of a collective-bargaining agreement or of a right to arbitrate anything.

Even after a union business agent visited Flair's jobsite in 1968 and discovered "a non-union employee operating a piece of equipment," no action was taken by the Union until a suit for specific performance and damages was filed some five months later. No demand was made for arbitration, and no claim of any right to arbitration was made in the original complaint. The District Court,

Yet the phrase "any difference," if given its normal meaning in a labor contract, refers to disputes relating to hours, wages, fringe benefits, seniority, grievances, and to other issues customarily arising within the terms of a collective-bargaining agreement. I cannot believe that this language was intended to include the arbitration of an equitable defense asserted against the enforceability of the *entire* contract. Indeed, the Union itself did not construe the language to cover arbitration of this issue, as it asserted no such claim until after the District Court suggested it.[2]

But my dissent does not turn solely on an interpretation of the arbitration clause or of any other provision of the agreement. The defense of laches is equitable in nature. The customary situation in which it is invoked is where a contract *does* exist and, but for laches of one of the parties, would be enforceable. In this case, Flair relied in substance on two defenses: (i) that the 1964 memorandum agreement (the only agreement Flair ever signed) had been abandoned by the Union; and (ii) that even if it had not been abandoned and the arbitration clause was as broad as this Court construes it to be, the defense of laches was available as an affirmative defense. The essence of the latter defense is that the Union, by virtue of its conduct and Flair's reliance thereon, was estopped and precluded from enforcing any and all provisions of the contract, including the arbitration clause. This position was sustained by the courts below. The Court of Appeals correctly held:

> "The factual context of this appeal thus narrows the issue before us to the question of whether a party

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not the Union, first suggested the possibility of arbitration. In these circumstances, and with all respect, I find no support whatever in the record for the Court's holding "that the parties did in fact agree to arbitrate."

[2] See n. 1, *supra*.

to a collective bargaining agreement which contains an arbitration clause may be so dilatory in making the existence of vaguely delineated disputes known to the other party that a court is justified in refusing to compel the submission of such disputes to arbitration." 440 F. 2d 557, 559 (1971).

The District Court, which heard the testimony of the parties, emphasized the burden imposed upon Flair by the Union's prolonged and unexplained delay and the ambiguity of its various positions:

> "To require Flair to respond, through arbitration, to general charges of noncompliance with contract provisions allegedly beginning more than two years before this suit was filed would impose an extreme burden on its defense efforts. Especially is this so when, as demonstrated at the hearing, Flair understandably considered the contract to have been abandoned soon after its inception. Plaintiff has offered no explanation for its delay in enforcement; yet to compel arbitration would reward plaintiff for its own inaction and subject defendant to the risk of liability because of actions taken or not taken in reliance on plaintiff's apparent abandonment."

I am aware of the strong policy considerations in favor of the arbitration of union-management disputes. *John Wiley & Sons* v. *Livingston*, 376 U. S. 543 (1964). But neither *Wiley*, nor any other case to my knowledge, has forced arbitration upon a party in circumstances such as these, where the equitable doctrine of laches was clearly applicable and was asserted. We would be well advised to recall Chief Justice Marshall's admonition:

> "[I]t is desirable to terminate every cause upon its real merits, if those merits are fairly before the court, and to put an end to litigation where it is in

the power of the court to do so." *Church* v. *Hubbart*, 2 Cranch 187, 232 (1804).

The effect of today's decision on Flair seems fairly clear. The Court's opinion imposes on this small business the "extreme burden" that the District Court found would result from requiring arbitration. Mr. Justice Cardozo once observed that litigation is a rare and catastrophic experience for the vast majority of men.[3] If Flair survives the long excursion to this Court, the arbitration that the majority requires, and a possible return to the District Court which already has ruled in its favor, it surely possesses more tenacity and better financial resources than the average small business. One may doubt whether many small businessmen would believe today's result possible.

The effect of the Court's decision also could be far reaching in the law of labor-management relations. It appears that the long-accepted jurisdiction of the courts may now be displaced whenever a collective-bargaining agreement contains a general arbitration clause similar to that here involved. If in such circumstances the affirmative defense of laches can no longer be invoked in the courts, what of other affirmative defenses that go to the enforceability of a contract? Does the Court's opinion vest in arbitrators the historic jurisdiction of the courts to determine fraud or duress in the inception of a contract? It seems to me that the courts are far better qualified than any arbitrators to decide issues of this kind. These are not questions of "labor law" nor are they issues of fact that arbitrators are peculiarly well qualified to consider. They are issues within the traditional equity jurisdiction of courts of law and issues which the courts below appropriately resolved. I would affirm the judgment of the Court of Appeals.

[3] B. Cardozo, The Nature of the Judicial Process 128 (1921).